86 - 1453

FILED
MAR 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI OR IN THE ALTERNATIVE OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Edwin P. Rome
Counsel of Record
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY & MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

Of Counsel:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

Counsel for Petitioners
Zenith Radio Corporation and
National Union Electric
Corporation

March 11, 1987

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Whether this Court's prior decision in this case required the Court of Appeals to conclude on remand that because petitioners' conspiracy claims under Section 1 of the Sherman Act failed, petitioners' individual and conspiracy claims under the Antidumping Act of 1916 must also fail?

2. Whether this Court reviewed the record evidence and determined that it was insufficient to withstand summary judgment on all claims under both Section 1 of the Sherman Act and the Antidumping Act of 1916?

3. Whether the legal standard that governs the evaluation of evidence presented in support of a claim of a below-cost pricing conspiracy under Section 1 of the Sherman Act — where evidence of conspiratorial price-fixing in a foreign market has been held by this Court to have little relevance — is identical to the standard that governs the evaluation of evidence presented in support of both individual and conspiracy claims under the Antidumping Act of 1916?

4. Whether this Court's prior decision in this case questioning whether respondents had a rational motive to conspire to engage in below-cost pricing prohibited by Section 1 of the Sherman Act necessarily required rejection of petitioners' claims that respondents had engaged in individual acts of dumping and a conspiracy to dump in violation of the Antidumping Act of 1916?

PARTIES TO THE PROCEEDING

Petitioners are Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE").

Respondents are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.

DESIGNATION OF CORPORATE RELATIONSHIPS

Zenith has no parents or non-wholly-owned subsidiaries. NUE is a wholly-owned subsidiary of White Consolidated Industries, Inc., which in turn is a wholly-owned subsidiary of A. B. Electrolux. NUE has no subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
DESIGNATION OF CORPORATE RELATIONSHIPS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. History of the Litigation	3
1. Prior to the Decision in *Matsushita*	3
2. The *Matsushita* Decision	4
3. The Decision on Remand	6
B. Petitioners' Antidumping Act Claims	7
REASONS FOR GRANTING THE WRIT	10
I. The Decision in *Matsushita* Did Not Compel Rejection of Petitioners' Dumping Evidence, Nor Did It Justify Summary Dismissal of Their Antidumping Act Claims	10
II. Sherman Act Standards Cannot Be Applied to Claims Under the Antidumping Act of 1916	12
A. The Antidumping Act of 1916 Addresses A Distinct Anticompetitive Practice	12
B. The Economic Rationale for Dumping Is Radically Different from the Economic Rationale for Below-Cost Pricing	14

TABLE OF CONTENTS—*(Continued)*

Page

C. The Third Circuit's Application of Sherman Act Standards of *Matsushita* to Antidumping Act Claims Is Neither Legally Nor Logically Supportable 17

III. The Third Circuit's Error Has Serious and Far-Reaching Adverse Implications for American Industry and Labor 19

CONCLUSION 21

APPENDIX

Judgment of the United States Court of Appeals for the Third Circuit, December 12, 1986 ..... A-1

Opinion of the United States Court of Appeals for the Third Circuit, December 12, 1986 ..... A-3

Order of the United States Court of Appeals for the Third Circuit, April 30, 1986 ..... A-12

Judgment of the United States Court of Appeals for the Third Circuit, December 5, 1983 ..... A-14

Judgment of the United States Court of Appeals for the Third Circuit, December 5, 1983 ..... A-18

General Docket, United States Court of Appeals for the Third Circuit, No. 80-2080 ..... A-22

General Docket, United States Court of Appeals for the Third Circuit, No. 81-2331 ..... A-27

General Docket, United States Court of Appeals for the Third Circuit, No. 81-2332 ..... A-32

General Docket, United States Court of Appeals for the Third Circuit, No. 81-2333 ..... A-37

TABLE OF CONTENTS—*(Continued)*

Page

Office of Secretary of the Treasury, Television Receiving Sets, Monochrome and Color, From Japan, Determination of Sales at Less Than Fair Value, 35 Fed. Reg. 18,549 (1970) A-42

United States Tariff Commission, Release, March 4, 1971 ..... A-44

United States Tariff Commission, Television Sets From Japan, AA1921-66, Determination of Injury ... A-46

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. ____, 106 S.Ct. 1505 (1986) 10

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U. S. ___, 107 S.Ct. 484 (1986) 14

Gaines v. Rugg, 148 U.S. 228 (1893) 11

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. ____, 106 S.Ct. 1348 (1986).... *passim*

In re Potts, 166 U.S. 263 (1897) 11

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895)..... 11

United States v. Haley, 371 U.S. 18 (1962)..... 11

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 513 F.Supp. 1100 (E.D. Pa. 1981) 4

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 494 F.Supp. 1190 (E.D. Pa. 1980) 3

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 723 F.2d 238 (3d Cir. 1983)..... 1, 4

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 723 F.2d 319 (3d Cir. 1983) 2, 4, 7

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 807 F.2d 44 (3d Cir. 1986)..... 1, 2, 6, 7, 16

Statutes:

Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72 .... 2, 3, 7, 12

Sherman Act § 1, 15 U.S.C. § 1 3

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 1651..... 2

28 U.S.C. § 2101..... 2

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

General Agreement on Tariffs and Trade, Article VI, 62 Stat. 3682 13

United States Tariff Commission, Television Sets from Japan, AA1921-66, Determination of Injury, dated March 4, 1971 .....8, 18

United States Trade-Related Employment: 1978-84 (U.S.I.T.C. Publication 1855, May 1986)..... 20

AFL-CIO Reviews the Issues: Report No. 10, AFL-CIO, December 1986 20

Viner, Dumping: A Problem in International Trade. 15, 16, 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI OR IN THE ALTERNATIVE OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the opinion and judgment of the Court of Appeals for the Third Circuit or, in the alternative, that a writ of mandamus be issued to the Court of Appeals because the Court of Appeals misconstrued this Court's mandate.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 807 F.2d 44 (3d. Cir. 1986), and is set out in the Appendix to this petition at A-3.[1] The prior opinions of the Court of Appeals on the Sherman Act and Antidumping Act claims are reported at 723 F.2d

1. References to the Appendix are cited herein as "A-_____."

238 (3d Cir. 1983), and 723 F.2d 319 (3d Cir. 1983), respectively. The proceedings in the Court of Appeals took place on remand from this Court following the decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ____, 106 S.Ct. 1348 (1986).

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1986. 807 F.2d 44 (3d Cir. 1986), A-1. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and by writ of mandamus pursuant to 28 U.S.C. § 1651 and Rules 26 and 27 of this Court. The Court of Appeals has been served with a copy of this petition pursuant to Rule 27.2(b) of this Court. The petition is timely under 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court.

STATUTE INVOLVED

The Antidumping Act of 1916, 15 U.S.C. § 72, provides in pertinent part as follows:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of

restraining or monopolizing any part of trade and commerce in such articles in the United States.

* * *

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.[2]

STATEMENT OF THE CASE

A. History of the Litigation

1. Prior to the Decision in Matsushita

This litigation began when petitioner NUE filed suit against the respondent Japanese television manufacturers after NUE was forced to abandon its television manufacturing business. Petitioner Zenith filed its complaint following Matsushita's acquisition of Motorola's consumer electronics division.[3] Petitioners charged respondents with violations of Section 1 of the Sherman Act, 15 U.S.C. §1, violations of other antitrust statutes, and violations of the Antidumping Act of 1916, 15 U.S.C. § 72.

In 1981, after years of pretrial disputes and protracted discovery on respondents' pending counterclaims, the District Court addressed petitioners' claims on the merits. In two separate decisions the District Court granted summary judgment dismissing the claims under the Antidumping Act, 494 F. Supp.

2. Petitioners' Complaints also allege violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, Section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, Section 2(a) of the Robinson Patman Act, 15 U.S.C. § 13(a), and Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. After Zenith's suit was filed, respondents petitioned the Judicial Panel on Multidistrict Litigation to move the Zenith case to New Jersey. The Panel, however, transferred NUE's action from the District of New Jersey to the Eastern District of Pennsylvania, where it was consolidated with Zenith's action.

1190 (E.D. Pa. 1980), and under the Sherman Act. 513 F. Supp. 1100 (E.D. Pa. 1981).

Petitioners appealed these determinations to the Court of Appeals. On December 5, 1983, that Court reinstated the antitrust claims. 723 F.2d 238 (3d Cir. 1983). On the same day, in a separate opinion and judgment, the Court of Appeals also held that petitioners had presented sufficient evidence of individual violations of the Antidumping Act and of a conspiracy to violate that statute to defeat respondents' motions for summary judgment. 723 F.2d 319 (3d Cir. 1983).

2. The Matsushita Decision

Following the Third Circuit's decisions, respondents petitioned this Court for a writ of certiorari with respect to the antitrust judgment. This Court granted certiorari to review that ruling. Respondents did not seek review of the separate Antidumping Act judgment.

On March 26, 1986, this Court decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ____, 106 S.Ct. 1348 (1986). In that decision, the Court reversed the Third Circuit and stated that it perceived no "apparent motive" for respondents to have entered into an anticompetitive, below-cost pricing conspiracy prohibited by the Sherman Act. The Court concluded that, because "antitrust law limits the range of permissible inferences from ambiguous evidence," 475 U.S. at __, 106 S.Ct. at 1357, the Court of Appeals should determine whether the evidence was legally sufficient to sustain the Sherman Act claims.

The Court's decision was expressly limited to a determination of the legal standard applicable to evidence of a conspiracy to engage in below-cost pricing under the Sherman Act.[4] The Court noted that such pricing requires that those engaging in it suffer losses for some period of time. The Court further noted

4. Stating that it "review[ed] only the standard," the Court cautioned that it did not purport to address "the weight assigned to particular pieces of evidence" and therefore found it unnecessary to state the facts in great detail. 475 U.S. at _____, 106 S.Ct. at 1351.

that rational businessmen would enter into a conspiracy to price below cost only if they could reasonably expect to acquire monopoly power in the foreseeable future that would enable them to recoup those losses. In the absence of a showing that such monopoly power could be acquired, the Court held that a Sherman Act conspiracy could not be inferred from otherwise ambiguous evidence.

The Court also held that petitioners' direct evidence that respondents had entered into a conspiracy to charge supracompetitive prices in Japan was not relevant to any claims under the Sherman Act of a below-cost pricing conspiracy in the United States market. It determined that the central dumping aspects could not be considered in the Court's limited review of the Sherman Act conspiracy claims, pointing out that conspiratorial pricing in the closed Japanese market could not inflict "antitrust" injury in the United States and was therefore separate collusive activity not recognized as relevant to the legal standard applicable to the Sherman Act conspiracy claims under review.

The Court noted that petitioners also had stated claims under the Antidumping Act of 1916 and that the Third Circuit had upheld those claims. The Court expressly declined the invitation to review that decision and judgment, despite respondents' argument that a decision on the Sherman Act claims should somehow govern the disposition of the Antidumping Act claims. 475 U.S. at ____ n.3, 106 S.Ct. at 1352 n.3. It therefore had no occasion to address any different economic motive or intent the respondent Japanese television manufacturers might have had to engage in dumping, *i.e.*, unilateral sales of products in the United States at prices below the prices at which they sold such products in their home market, or the motive to conspire to engage in dumping. The Court remanded the case to the Court of Appeals for a determination whether any other record evidence supported petitioners' Sherman Act claims under the legal standard this Court had held applicable to those claims.

3. The Decision on Remand

Prefacing its opinion on remand with the statement that it found this Court's directions "ambiguous" and "somewhat confusing," 807 F.2d at 46, A-6, the Third Circuit treated the remand as largely pointless because, as it observed, "the Supreme Court had the very same summary judgment record before it that [the Court of Appeals] had considered, and does exercise the same plenary review of the propriety of the district court summary judgment." 807 F.2d at 46, A-6. It concluded that the decision in *Matsushita* required that it dismiss *all* of petitioners' claims — the Antidumping Act claims as well as the Sherman Act claims.[5] It reached this conclusion notwithstanding the fact that this Court had considered only the antitrust claims and that this Court's opinion and mandate were limited to that portion of the litigation. The Court of Appeals stated that it was bound by "the law of the case" and concluded:

> Since the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping Act conspiracy claim must fail with it. The Antidumping Act claims against individual Japanese manufacturers are equally vulnerable. . . . The summary judgment in favor of each defendant will therefore be affirmed. . . ." 807 F.2d 44, 49, A-11.

The Court of Appeals engaged in no analysis whatsoever of the different economic rationales for dumping as contrasted with predatory, below-cost pricing, nor did it consider the different purpose and scope of the Antidumping Act. The Third Circuit's ruling rested entirely upon its interpretation and application of this Court's antitrust ruling in *Matsushita*.

---

5. The Third Circuit's decision, however, does not end this litigation. Two years after Zenith filed its complaint, respondents filed counterclaims seeking millions of dollars in alleged damages from Zenith for, among other things, its pursuit of this litigation. The counterclaims were the subject of voluminous discovery by respondents over a period of three years. Thus, while the Third Circuit's order summarily dismissed all of petitioners' claims, the counterclaims against Zenith are still pending below.

B. Petitioners' Antidumping Act Claims

Petitioners have charged respondents with dumping, an international trade practice prohibited by the Antidumping Act of 1916, 15 U.S.C. § 72. Dumping is the sale of imported products in this country by foreign producers at prices that are substantially below the prices they charge in their foreign home markets. The Act prohibits such international price discrimination committed either independently by a single company or conspiratorially by a group of companies with the intent to injure an American industry. Petitioners alleged that respondents engaged in both individual and conspiracy violations of the Antidumping Act.

As the Court of Appeals recognized when it first considered petitioners' Antidumping Act claims, substantial evidence exists showing individual acts of dumping and the conspiracy to dump. 723 F.2d at 329. It acknowledged on remand that "[respondents'] prices could be found to have been dumping prices." 807 F.2d at 48, A-10. The United States Department of Treasury investigated respondents' pricing practices and in 1970 found that respondents were selling televisions in this country at less than fair value, far less than the prices they charged in Japan. A-42. Petitioners presented detailed, model-by-model price comparisons between respondents' domestic and export models. This evidence established that prices in Japan exceeded those in the United States by almost 60 percent. Because respondents' United States prices were far below the competitive pricing levels of their American competitors, the United States manufacturers suffered an alarming loss of business, their prices in this country fell sharply, and their profits eroded and then disappeared. Further, as this Court observed in *Matsushita*, petitioners presented direct evidence that respondents had conspired to charge supra-competitive prices in Japan. 475 U.S. at ____, 106 S.Ct. at 1361.

The evidence further established that respondents acted to conceal their illegal dumping activities. 723 F.2d at 311. They deceived both the Japanese and United States governments concerning their actual United States prices, concealed their actual

prices from United States customs authorities, and brought hundreds of millions of dollars of products through United States customs on false entry documents and invoices. Respondents and their importers intentionally paid extra *ad valorem* duties on higher, fictitious prices, and systematically refunded money to importers through secret Swiss, Hong Kong and other foreign bank accounts to avoid the imposition of antidumping duties. Respondents thus lied to the United States Department of Treasury in the administrative antidumping investigation, falsely reported prices to avoid a finding of dumping, and, when dumping margins were found even on the basis of falsely inflated import prices, attempted to minimize antidumping duties by continuing to report false prices thereafter.

That these activities seriously injured the United States industry is not disputed. Counsel for respondents conceded this fact when this case was previously before this Court. (Tr. of Oral Arg., No. 83-2004, at 48.) Further, the United States Tariff Commission (now called the International Trade Commission) found in 1971 that the United States television industry had been injured by the sale in this country of televisions from Japan at less than fair value. A-46. The Treasury Department's dumping finding was based on the Tariff Commission's unanimous finding that the United States television industry ". . . is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended" A-46, and its specific finding that:

> . . . [t]he ability of the Japanese suppliers to undersell domestic producers in the U.S. market appears to have been significantly enhanced as a result of the selling of Japanese sets at less than fair value. (A-50-51)

A further study by the International Trade Commission in 1977 found that the United States television industry continued to sustain severe injury by reason of imports. Producers and assemblers of television receivers fell by one-third in eight years (U.S. International Trade Commission, Investigation No. TA-201-19, March 1977). During the same period the number of

plants declined by half and even the remaining establishments were seriously under-utilized. The Commission further found that many thousands of jobs had been lost because of imports and the few surviving United States companies were in a loss or at best a break-even position. This erosion and destruction of the industry has continued.[6] Today only two manufacturers remain, Zenith and RCA.[7] Last year, GE acquired RCA mainly for its broadcasting and businesses other than the profit-starved television segment. Today television imports from the Far East have a "73.2% share of total color supply" in the United States. *Television Digest*, Vol. 29, No. 9 at 13 (March 2, 1987).

Finally, petitioners presented evidence that respondents were able to achieve these results without sustaining out-of-pocket losses in their combined operations in the United States and Japanese markets. The evidence indicates that respondents made overall profits and maintained an acceptable rate of return throughout the dumping period. Respondents' low prices in the United States coincided with expansion of their production facilities far beyond the capacity needed to serve the Japanese market, which was closed to competition from non-Japanese manufacturers by a system of tariff and non-tariff barriers. By dumping their excess output in the United States, respondents were able to enjoy the cost savings associated with large-scale operations.

---

6. Respondents' activities injured United States industry in a more insidious way as well. Respondents' dumping left American manufacturers in a weakened condition at the precise time that rapid technological innovation and new product development — *e.g.* videocassette recorders, stereo television, and videodisc players — required large capital investment. As a result, respondents are now completely free from American competition with respect to products such as videocassette recorders and cameras.

7. Zenith's dividends declined steadily as imports increased, and Zenith has been unable to pay dividends since 1982.

REASONS FOR GRANTING THE WRIT

I. The Decision in *Matsushita* Did Not Compel Rejection of Petitioners' Dumping Evidence, Nor Did It Justify Summary Dismissal of Their Antidumping Act Claims.

The Court of Appeals mistakenly interpreted *Matsushita* to require rejection of petitioners' evidence of individual acts of dumping and conspiracy to dump, as well as the evidence offered in support of their Sherman Act conspiracy claims. As a consequence, the Court of Appeals believed that *Matsushita* required summary dismissal of petitioners' dumping claims. The Court of Appeals ignored the fact that this Court had expressly "decline[d] . . . to review" the Antidumping Act claims, 475 U.S. at ____ n. 3, 106 S.Ct. at 1352 n.3, and that the remand ordered by this Court did not involve those claims.

This Court carefully limited the scope of its ruling in *Matsushita*. The Court made it plain that petitioners' claims under the Antidumping Act — claims that include both *individual, non-conspiratorial* violations of that Act and conspiracy violations — were not before it. The issue before the Court was "the standard district courts must apply when deciding whether to grant summary judgment in an *antitrust conspiracy* case." 475 U.S. at ____, 106 S.Ct. at 1351 (emphasis added). The Court's analysis and formulation of the standard were explicitly and necessarily based upon the language of and policies underlying Section 1 of the Sherman Act.[8] As this Court has held, the legal standard to be applied in evaluating the sufficiency of the evidence offered in support of a claim is governed by the particular substantive law that underlies that claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. ____, ____, 106 S.Ct. 2505, 2510 (1986).

Notwithstanding this Court's express limitation of its decision to the standard to be applied to petitioners' Sherman Act claims, the Court of Appeals viewed that decision as "the law of the case" with respect to petitioners' claims under the Antidumping Act. The Third Circuit engaged in no analysis of

8. The Court held that "antitrust law limits the range of permissible inferences from ambiguous evidence" in a Sherman Act Section 1 case. 475 U.S. at ____, 106 S.Ct. at 1357.

the antidumping claims, concluding simply that the antitrust and antidumping claims were both controlled by this Court's Sherman Act analysis and by the instructions on remand.

This fundamental and inexplicable error cannot be attributed to this Court's decision.[9] Although the Third Circuit considered this Court's opinion to be "ambiguous" and "confusing," there can be no confusion concerning the scope of that opinion: this Court simply did not address the Antidumping Act claims. Moreover, the Court of Appeals also appears to have acted on the impression that — notwithstanding this Court's statement that it reviewed only the legal "standard" and not the "weight" of evidence, 475 U.S. at ____, 106 S.Ct. at 1351 — this Court had conducted a detailed factual review of the record to make a determination of the actual existence of respondents' motive to conspire in violation of Section 1 of the Sherman Act.[10] By so interpreting *Matsushita*, the Third Circuit misconstrued and exceeded the scope of this Court's mandate. This failure to comply with the Court's mandate is an error that must be corrected either upon an application for a writ of mandamus, or upon a new appeal. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). When this Court issues its mandate, a Court of Appeals is not to "vary it, or examine it for any other purpose than execution, or give any other or further relief; or review it. . . ." Id.[11]

---

9. Equally inexplicable is the Third Circuit's statement that it had entered a single judgment on the Antidumping Act and antitrust claims, 807 F.2d at 46, A-5, and that this Court's reversal and remand of that judgment required reconsideration of both types of claims. In fact, the Court of Appeals had entered two separate judgments, only one of which — the antitrust judgment — was reversed and remanded by this Court for further consideration. A-14 (antitrust judgment) and A-18 (antidumping judgment). *See also* A-22 to A-41 (excerpts of general docket of Court of Appeals).

10. Respondents, in fact, told this Court that the "clearcut legal questions" before this Court involved only the correct "legal standard" and that "the answers do not require this Court to make a *de novo* trip through the record." (Reply Brief for Petitioners, dated July 18, 1984, in No. 83-2004, at 1-2).

11. *See also United States v. Haley*, 371 U.S. 18, 20 (1962); *In re Potts*, 166 U.S. 263, 266 (1897); *Gaines v. Rugg*, 148 U.S. 228 (1893).

II. Sherman Act Standards Cannot be Applied to Claims Under the Antidumping Act of 1916.

The Third Circuit's error goes far beyond technical misapplication of this Court's mandate. As a result of its confusion concerning the scope of *Matsushita*, the Court of Appeals concluded that neither claims that individual firms had engaged in dumping nor claims that multiple firms had conspired to do so can be sustained unless the plaintiff can also prove a substantive violation of Section 1 of the Sherman Act by a below-cost pricing conspiracy. The Third Circuit's decision ignores the language of the Antidumping Act and the fundamental economic differences between predatory, below-cost pricing and dumping. Moreover, the Third Circuit's decision effectively eliminates the remedy Congress created, wholly apart from the Sherman Act, for domestic firms injured by unfair foreign competition.

A. The Antidumping Act of 1916 Addresses a Distinct Anticompetitive Practice.

The language of the Antidumping Act makes it explicit that it addresses a different wrong and provides a different remedy than does the Sherman Act. In the Antidumping Act, Congress prohibited foreign firms from selling products "within the United States at a price substantially less" than the "wholesale price of such articles . . . in the principal market of the country of their production," when such pricing practices are pursued "with the intent of destroying or injuring an industry in the United States." 15 U.S.C. § 72. Congress created this prohibition because it made the judgment that this form of competition by foreign firms is unfair to American competitors and has adverse consequences for American industry, labor and, in the long run, the consumer. Congress' purpose was to create a remedy specifically directed against a notorious international trade practice that is prohibited by the laws of virtually every industrialized

nation.[12]

Although the Antidumping Act prohibits dumping with the intent of monopolizing or restraining trade, it goes much further than the Sherman Act. It also prohibits dumping with the intent of destroying or injuring particular American industries or of preventing the establishment of an industry in this country. Individual acts of dumping violate the Act whether or not the foreign firm has monopoly power or has participated in a conspiracy to restrain trade. Further, the Antidumping Act does not require that a plaintiff establish an injury to competition or antitrust injury to itself.

The Antidumping Act, in contrast to the Sherman Act, is designed to afford a remedy to injured domestic manufacturers for what Congress determined to be unfair competition by foreign firms: the selling of products in the United States market at prices substantially below those charged in foreign markets.

---

12. In Article VI of the General Agreement on Tariffs and Trade ("GATT"), the United States and many of our trading partners, including Japan, formalized their joint condemnation of dumping: "1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." 62 Stat. 3682.

In 1916 when the first United States antidumping act was enacted, dumping had already been outlawed by a number of countries. *See* Report of the Federal Trade Commission, "Antidumping Legislation and Other Import Regulation in the United States and Foreign Countries," Senate Doc. No. 112, 73d Cong. 2d Sess. (January 11, 1934); U.S. Tariff Commission Report to the House Ways and Means Committee, "Dumping and Unfair Foreign Competition in the United States," dated October 4, 1919; and the Federal Trade Commission's "Supplemental Report on Antidumping Legislation and Other Import Regulations in the United States and Foreign Countries" dated June 27, 1938.

B. The Economic Rationale for Dumping Is Radically Different From the Economic Rationale for Below-Cost Pricing.

The differences between the Antidumping Act and the Sherman Act reflect fundamental differences between the economics of dumping and of predatory, below-cost pricing. This Court's decision in *Matsushita* underscores the importance of a clear understanding of the economic rationale of the pricing activities at issue.

Under this Court's decision, predatory pricing under section 1 of the Sherman Act involves a conspiracy to price below cost in a particular market with the objective of destroying competition. Once competition has been destroyed, the conspirators will raise prices to reap monopoly profits. The ability to raise prices may be important because the conspirators are permitted thereby to recoup the losses they suffered by originally pricing below cost. Where the conspirators cannot reasonably expect to acquire the monopoly power needed to charge supracompetitive prices, their motive to conspire to engage in predatory pricing may be questioned. *See Matushita*, 475 U.S. at ____, 106 S. Ct. at 1357-60; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, ____, 107 S.Ct. 484, 495 n.17 (1986).

Dumping, in contrast, is by definition a *two market, two-price* strategy, whereby foreign manufactured goods are imported into the United States at prices substantially below the prices at which such goods are sold in foreign countries. The touchstone in analyzing a dumping claim is the relationship between the foreign manufacturer's prices in the United States and in its foreign home market. To engage in effective dumping, a foreign manufacturer need not price below its marginal costs and thus need not sustain losses in the sense discussed in this Court's opinion in *Matsushita*. As long as the foreign manufacturer is able to cover fixed, as well as marginal, costs in a protected home market, it can export its product indefinitely at a price equal to marginal cost. An equally efficient competitor in an export market — faced with the need to recover both fixed and marginal

costs — will be unable to withstand this foreign competition. This practice can continue long term and can produce consistent profits for the foreign manufacturer.

Indeed, economic analysis confirms that dumping can be a highly profitable activity. In industries in which large-scale production permits cost reduction by economies of scale, dumping represents a means of increasing production volume and reducing unit costs.[13] The resulting cost reductions support further dumping by making it possible for the firm that dumps *either* to lower its export prices without selling below its marginal cost and incurring out-of-pocket losses, *or* to maintain low export prices and increase profits as the economies of scale generate further cost savings. Dumping enables the foreign manufacturer to obtain the economies of operating at or near full capacity without sacrificing the monopoly profits available in its protected home market.[14] The manufacturer therefore will be willing to engage

---

13. The record is replete with evidence describing the economic rationale for dumping. Petitioners' economic expert, Dr. DePodwin, concluded that during the four-year period studied, between the Japanese and United States markets, respondents made overall profits of 5-10% without necessarily selling below marginal cost. The Nehmer Report likewise concluded that respondents achieved "an acceptable rate of return overall." (Report reproduced in the appendix in the prior appeal at No. 83-2004, Appendix Vol. 6 at 2257a).

14. *See* Viner, *Dumping: A Problem in International Trade* (Chicago 1923; reprinted in 1966), acknowledged by respondents as "*the book which is recognized as the classic work in the field.*" *See also*, 402 F.Supp. 251, 259 (E.D. Pa. 1975). Viner shows that "[t]he producer who resorts to dumping *always* does so with the aim of deriving a personal pecuniary advantage therefrom" (*Id.* at 29) and that in industries subject to economies of scale, the cost reductions made possible by dumping larger production volumes support continued dumping.

Viner states: "If a manufacturer can sell each year in his domestic market a part, but only a part, of his maximum possible output at higher prices than those ruling in outside markets, he may decide to maintain his domestic prices at this higher level and to seek f reign orders at reduced prices for the balance of his potential output in preference to reducing his domestic prices and in preference to operating only to part capacity. *By resorting to dumping he may obtain the economies of operation at full capacity without surrendering the profits to be derived from the sale of part of his output in the domestic market at prices above the foreign level.*" *Id.* at 27-28.

Viner also concludes that "[i]t is possible that a manufacturer may sell

in dumping whether or not it expects to acquire monopoly power in the United States.

Moreover, this type of dumping still makes economic sense when it is motivated by the "less ambitious" motive of weakening competitors in the market dumped on in order to cripple or discourage them from "contesting [the foreign producer's] prices or from extending their activities into his special markets,"[15] such as new products which may require new capital expenditure for plant or research and development.

All of the critical, structural economic conditions necessary for profitable, long-term dumping exist in this case:

> (i) A closed foreign home market in which prices were subject to respondents' collusive monopolistic control. *See Matsushita*, 475 U.S. at ___, 106 S.Ct. at 1361; 807 F.2d at 47, A-7.
>
> (ii) Rapid, continuous expansion of production volume in excess of demand in the foreign home market. 807 F.2d at 47, A-7.
>
> (iii) An industry subject to economies of scale. ("Joint Preliminary Pretrial Memorandum on Behalf of Certain Defendants" dated April 21, 1978, at 33).
>
> (iv) An industry in which fixed costs are an important part of total production costs. *Id.*[16]

NOTES *(Continued)*

abroad at reduced prices in order to increase his sales, without reduction of his domestic prices, *to such a rate that it will not only permit him to maintain full production from his existing plant facilities but will enable him to extend his plant so as to obtain the economies of larger-scale production*." *(Id. at 27-28)*.

15. Viner, *supra*, n. 14 at 122.

16. In addition, significant barriers to entry exist in the United States market by reason of high technology and capital requirements necessary for mass production so that weakening existing competitors is an effective strategy. For example, after studying this market in 1974, Philips, Europe's largest television manufacturer, rejected *de novo* entry in this market as "impractical" and "impossible" and determined instead in 1974 to purchase Magnavox, an American manufacturer — "the last attractive and practical vehicle through which to enter the United States home entertainment market." Philips concluded that "[t]o start from scratch is — as a practical matter — impossible." Deposition of

In the presence of these economic conditions, entering into a conspiracy to engage in dumping or unilaterally engaging in dumping was profitable, economically rational behavior for respondents. The substantially different economic motives underlying single market, below-cost pricing on one hand and dumping, a form of international price discrimination, on the other, make clear the nature of the Court of Appeals' error in extrapolating this Court's decision in *Matsushita* to the distinct dumping segment of this case.

C. The Third Circuit's Application of the Sherman Act Standards of *Matsushita* to Antidumping Act Claims Is Neither Legally Nor Logically Supportable.

In *Matsushita*, this Court concluded that a predatory pricing conspiracy would have required respondents to agree to accept losses, because only by pricing at a loss-producing level could respondents have violated the Sherman Act. This premise formed the principal basis for the Court's rejection of petitioners' antitrust claims, but it is simply inapplicable to dumping claims. Neither the language of the Antidumping Act nor the economic realities of dumping require below-cost pricing or out-of-pocket losses. There is nothing irrational in a conspiracy to injure United States competitors by pricing at low, but profitable, levels, *i.e.*, by dumping in the fashion the record in this case exemplifies.

Similarly, although under the Sherman Act a conspiracy to increase prices in a foreign market may not tend to show a conspiracy to price predatorily in the United States, *Matsushita*, 475 U.S. at ____, 106 S.Ct. at 1359-60, it does prove a necessary element of an Antidumping Act charge. The Antidumping Act by its terms *requires* examination of the pricing structure in a foreign market. A combination or conspiracy to set supra-competitive prices in a foreign market is highly probative in

North American Philips Corporation, Exhibit 53. One of its internal studies of *de novo* market entry concluded bluntly that "this is not an acceptable alternative with regard to the investment and time required." Deposition of North American Philips, Exhibit 119 at 6, App. Vol. 11 at 4266a.

showing an Antidumping Act conspiracy. Indeed, "monopolistic control of the home market is perhaps the most important prerequisite to the existence of dumping . . . ." Viner, *Dumping: A Problem in International Trade*, at 376. In contrast to the Sherman Act analysis in *Matsushita*, in an Antidumping Act case the court can and must draw inferences of illegal dumping from evidence of a supra-competitive pricing structure in a foreign market. The scheme cannot be dismembered.

The Court of Appeals' error is starkest in its wholesale application of Sherman Act conspiracy standards to *individual* Antidumping Act claims. Section 1 of the Sherman Act prohibits only conspiratorial or concerted action; a single defendant, acting alone, cannot violate Section 1. This is not the case under the Antidumping Act. If petitioners can show an individual foreign competitor's intent to injure an industry in the United States, given the economic rationality of dumping, such a showing is sufficient to prove a claim under the Antidumping Act, whether or not a conspiracy is shown.

Petitioners presented evidence on all essential elements of their claims in opposition to respondents' summary judgment motions. It is undisputed that respondents intentionally set their American prices at levels far below their Japanese prices — the Department of Treasury found this to be a fact, and petitioners' model-by-model price comparison independently established this point. It is plain that respondents engaged in elaborate activities to conceal their actual United States prices at dumping levels paying extra *ad valorem* duties and risking forfeiture and criminal prosecution to do so. It is also undisputed that this price discrimination injured American industry — the Tariff Commission reached this conclusion, and respondents conceded this fact before this Court. All petitioners' damage proofs adduced in pretrial proceedings had been conceded for the purpose of respondents' summary judgment motions. Finally, it cannot be disputed that this injury was a natural and foreseeable, intended consequence of respondents' pricing activities. Therefore, entirely apart from the direct evidence of respondents' conspiracy to charge high prices in Japan, 475 U.S. at ____, 106 S.Ct. 1361, individual acts of dumping have been shown.

The Third Circuit ignored this evidence because of its fundamental misreading of *Matsushita*. That misreading resulted in the blind application of *Matsushita* to claims asserted under a statute that prohibits conduct that is motivated by a different economic rationale from that involved in single-market predatory pricing. This decision should not be allowed to stand.

III. The Third Circuit's Error Has Serious and Far-Reaching Adverse Implications for American Industry and Labor.

The Court of Appeals' decision leaves United States industry without the remedy Congress created to protect it from this unfair competitive practice. The practice affects not only members of the targeted industries but also their employees and ancillary supply industries. Total employment in the United States consumer electronics industry declined by almost one-third between 1968 and 1977. In the United States television industry, major reductions in employment related to television production occurred during this same period. The International Trade Commission estimated that the average number of persons (production and related workers) employed in television manufacturing declined by 14,000, or more than 36 percent, between 1968 and 1977, with the bulk of this decline occurring after 1973. Reduced employment in the consumer electronics industry, especially in television production, also affects employment in other, related industries.[17]

The impact of dumping on domestic employment in the television industry continues to be devastating. A January 1986 study published by the United States Department of Commerce on the direct and indirect impact of foreign trade on employment pointed out that the $123 billion trade deficit in 1984 meant that

17. Nehmer Report, App. Vol. 6 at 2503a. For every 1,000 jobs in plants producing television receivers there are approximately 2,150 jobs in supplying plants and other industry groups. The largest of these supplying plants are those which produce electronic components, wood products and furniture, glass, and fabricated metals, as well as wholesale and retail trade. Thus, when total employment in television manufacturing firms fell from 52,000 to 39,900 from 1973 to 1975, or a net loss of more than 12,000 jobs, the actual total loss was closer to 38,000 jobs. *Id.* at 2503a-4a.

employment was between 1.3 percent and 2.7 percent lower than it would have been if trade were balanced — a loss of between 1.1 and 2.4 million jobs in 1984. Employment losses from trade in electrical and electronic equipment in 1985 were the second highest — next to textile mill products — of any domestic manufacturing industry. U.S. Trade-Related Employment: 1978-84 (U.S.I.T.C. Publication 1855, May 1986), as updated in AFL-CIO Reviews the Issues: Report No. 10, December 1986, p. 3, Table 2.

The questions presented by the lower court's unusual action on remand are thus of vital importance. Their significance extends far beyond the American consumer electronics industry and its employees. Indeed, seldom in the seventy years since the Antidumping Act was enacted have the protections provided by that statute been of greater importance than they are today. A massive trade deficit, high unemployment, and the decline of basic industries in this country have placed the concerns addressed by the Act at the forefront of current foreign policy discussions. If, contrary to Congress' express intent, the Third Circuit's application of the Antidumping Act is permitted to stand, large segments of American industry and labor will be deprived of the only remedy available to compensate for the injurious effects of unfair foreign competition. The Court of Appeals' decision eliminating the remedy provided by the Act should not be allowed to stand.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari or in the alternative of mandamus should be granted.

Respectfully submitted,

EDWIN P. ROME
Counsel of Record
WILLIAM H. ROBERTS
ARNOLD I. KALMAN
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Counsel for Petitioners
Zenith Radio Corporation and
National Union Electric Corporation

OF COUNSEL:

PHILIP J. CURTIS
JOHN BORST, JR.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Judgment of the United States Court of Appeals for the Third Circuit, December 12, 1986 ..... A-1

Opinion of the United States Court of Appeals for the Third Circuit, December 12, 1986 ..... A-3

Order of the United States Court of Appeals for the Third Circuit, April 30, 1986 ..... A-12

Judgment of the United States Court of Appeals for the Third Circuit, December 5, 1983 ..... A-14

Judgment of the United States Court of Appeals for the Third Circuit, December 5, 1983 ..... A-18

General Docket, United States Court of Appeals for the Third Circuit, No. 80-2080 ..... A-22

General Docket, United States Court of Appeals for the Third Circuit, No. 81-2331 ..... A-27

General Docket, United States Court of Appeals for the Third Circuit, No. 81-2332 ..... A-32

General Docket, United States Court of Appeals for the Third Circuit, No. 81-2333 ..... A-37

Office of Secretary of the Treasury, Television Receiving Sets, Monochrome and Color, From Japan, Determination of Sales at Less Than Fair Value, 35 Fed. Reg. 18,549 (1970) A-42

United States Tariff Commission, Release, March 4, 1971 ..... A-44

United States Tariff Commission, Television Sets From Japan, AA1921-66, Determination of Injury ... A-46

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2080, 81-2331/2332/2333

In re:
JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION

ZENITH RADIO CORPORATION
and
NATIONAL UNION ELECTRIC CORPORATION,
Appellants

(D.C. MDL NO. 0000189)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Submitted Under Third Circuit Rule 12(6)
October 31, 1986
Before: SEITZ, GIBBONS, and MESKILL*, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 21 and 22, 1982. By opinion and judgment filed December 5, 1983, this Court affirmed in part and reversed in part the judgment of the said District Court and remanded the causes for further proceedings.

---

* Hon. Thomas J. Meskill, U.S. Circuit Judge for the Second Circuit, sitting by designation.

723 F.2d 238, 723 F.2d 319 (3rd Cir. 1983). The Supreme Court by order dated April 1, 1985, allowed certiorari and subsequently reversed the judgment of this Court and remanded the cause for further proceedings in conformity with its opinion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, U.S. , 106 S. Ct. 1348 (1986).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court granting summary judgment on the antidumping claims in favor of all defendants, entered April 14, 1980, as amended by the orders entered April 23 and 25, 1980, be, and the same are hereby affirmed in all respects.

Costs taxed against the appellants to the extent they have not previously been taxed.

ATTEST;
SALLY MRVOS
Clerk

December 12, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2080, 81-2331/2332/2333

In re:
JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITGATION

ZENITH RADIO CORPORATION
and
NATIONAL UNION ELECTRIC CORPORATION,
Appellants

(D.C. MDL NO. 0000189)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Submitted Under Third Circuit Rule 12(6)
October 31, 1986
Before: SEITZ, GIBBONS, and MESKILL*,
Circuit Judges

(Opinion Filed: December 12, 1986)

EDWIN P. ROME, ESQ.
WILLIAM H. ROBERTS, ESQ.
ARNOLD I. KALMAN, ESQ.
BLANK, ROME, COMISKY & MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103

---

* Hon. Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

Of Counsel:
PHILIP J. CURTIS, ESQ.
JOHN BORST, JR., ESQ.
ZENITH RADIO CORPORATION
1000 Milwaukee Avenue
Glenview, IL 60025

Attorneys for Zenith Radio Corporation
and National Union Electric Corporation

HENRY T. REATH, ESQ.
TERRY R. BRODERICK, ESQ.
FRANK A. LUCHAK, ESQ.
JUDITH N. RENZULLI, ESQ.

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia PA 19102

JOHN T. DOLAN, ESQ.
ARNOLD B. CALMANN, ESQ.

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
Gateway One
Newark, New Jersey 07102

HOKEN S. SEKI, ESQ.

SEKI & JARVIS
520 Madison Avenue
New York, New York 10022

DONALD F. TURNER, ESQ.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Mitsubishi Electric
Corporation and Melco Sales, Inc.

OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

This matter is before us on remand from the Supreme Court. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ____U.S. ____, 106 S. Ct. 1348 (1986). The plaintiffs, American manufacturers of consumer electronic products, sued Japanese manufacturers of such products, alleging antitrust and antidumping violations of American law. The district court granted summary judgment in favor of all defendants on all claims. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980) (granting summary judgment on the 1916 Antidumping Act claims), 513 F. Supp. 1100 (E.D. Pa. 1981) (granting summary judgment on the conspiracy claims). Exercising the plenary review appropriate for summary judgment cases, this court in two separate opinions affirmed in part and reversed in part. *In re Japanese Electronic Products*, 723 F.2d 238, 723 F.2d 319 (3d Cir. 1983). The defendants in whose favor summary judgments were not affirmed petitioned for certiorari. The Supreme Court granted certiorari on the antitrust segment of the case, which involved claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1982). The Supreme Court judgment, dated March 26, 1986, provides;

> **THIS CAUSE** came on to be heard on the transcript of the record from the [United States Court of Appeals for the Third Circuit] and was argued by counsel.
>
> **ON CONSIDERATION WHEREOF,** it is ordered and adjudged by the Court that the judgment of the above court in this cause is reversed with costs, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further proceedings in conformity with the opinion of this Court.

Although we dealt with the Sherman Act claims and the claims under the Antidumping Act of 1916, 15 U.S.C. §72 (1982), in two separate opinions, this court entered a single judgment. This

judgment has now been reversed and remanded by the Supreme Court, with a direction that "this cause" be remanded for further proceedings in conformity with its opinion. Thus it appears that we are directed to reconsider not only the Sherman Act claims, but the entire case. Complicating the picture further, the opinion of the Supreme Court provides;

> On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so.

106 S. Ct. at 1362. This language also appears to suggest that we must reconsider the Antidumping Act claims on which the Supreme Court did not grant certiorari, as well as the Sherman Act claims which it did review. We find this suggestion to be somewhat confusing since the Supreme Court had the very same summary judgment record before it that this court had considered, and does exercise the same plenary review of the propriety of the district court summary judgment.

Faced with a seemingly ambiguous direction, this court directed the parties to file briefs addressing: a) the appropriate disposition of the case in light of the Supreme Court direction on remand; b) whether the law with respect to permissible inferences of concert of action announced by the Court for Sherman Act claims applies to concert of action issues arising under other statutes, such as the Antidumping Act of 1916; and c) what disposition should be made of the Antidumping Act claims if these inferences do apply. We now conclude: (1) that the Supreme Court's direction that this court may consider "other evidence" means that other evidence already in the summary judgment record may be considered; (2) that there is no evidence in the record supporting an inference of a predatory pricing conspiracy among the defendants in the American market other than that which the Supreme Court has already held to be legally insufficient; and (3) that the Supreme Court's holding that there is

insufficient evidence of a conspiracy to price predatorily in the American market requires the affirmance of the summary judgment on the Antidumping Act claim.

The conspiracy on which the plaintiffs rely in support of their Sherman Act claims is a horizontal conspiracy among Japanese manufacturers of consumer electronic products to maintain artificially high prices in the Japanese home market to help support sales at low prices in the American export market, thereby injuring American manufacturers competing with them in the latter market. When this court first reviewed the summary judgment record, we concluded it permitted findings that there are high entry barriers in the Japanese home market; that the Japanese manufacturers have higher fixed costs and higher debt-equity ratios than their American counterparts; that the Japanese manufacturers, individually and in the aggregate, created higher plant capacities than could reasonably be absorbed by the Japanese home market, thereby creating an incentive to dispose of the excess capacity in a market outside Japan. 723 F.2d at 238. We also concluded that there is direct and circumstantial evidence of an agreement to stabilize Japanese home market prices to realize the profits needed to support sales at low prices in the United States. *Id.* at 309. Despite these conclusions, the Supreme Court conclusively held that the defendants "had no motive to enter into the alleged conspiracy." 106 S. Ct. at 1360. In addition, this court previously referred to evidence that the defendants' export sales generally were at prices which produced losses, often as high as twenty-five percent on sales. 723 F.2d at 311. We also noted that the five-company rule permitted an inference that allocation of customers in the United States, combined with price fixing in Japan, was intended to concentrate the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market. *Id.* The Supreme Court, however, conclusively held that "in light of the absence of any rational motive to conspire, neither [defendants'] pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a 'genuine issue for trial.' " 106 U.S. at 1362. These holdings are the law of the case

and are binding on this court. Consequently, the plaintiffs are now foreclosed from arguing that there was a motive to enter into the alleged conspiracy. They are also foreclosed from arguing that the direct and circumstantial evidence to which this court referred in its prior opinion is sufficient to overcome a motion for summary judgment. What is left open by the Supreme Court's remand, therefore, can only be a consideration of evidence other than pricing practices in the American market, conduct in the Japanese market, and agreements respecting customer allocation in the American market. Such evidence, moreover, must suffice to overcome the law of the case that there was no motive to conspire.

Plaintiffs' brief on remand essentially argues that the Supreme Court misunderstood their case when it assumed that their conspiracy theory was an alleged agreement to sell in the United States below cost — a conspiracy the Supreme Court deemed economically senseless. Instead, plaintiffs now contend that the conspiracy was one to sell in the American market at below the competitive market price, but above marginal cost. Manufacturers with excess capacity and high fixed costs, plaintiffs contend, have a rational motive to enter into such a conspiracy. This argument, however, is foreclosed because the Supreme Court has already addressed it. Explaining its use of the term predatory pricing, the Court observed:

> Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. . . . In such cases, "predatory pricing" means pricing below some appropriate measure of cost.
>
> There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need to resolve this debate here, because . . . this is a Sherman Act §1 case. For purposes of this case, it is enough

> to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

106 S. Ct. at 1355 n.8 (citations omitted). It is clear, therefore, that the Supreme Court understood the conspiracy theory to be one to price predatorily; that is, at a level which would injure the plaintiffs. Thus this court is not free to reject the Supreme Court's holding that there was no motive to conspire to fix low prices in the American market. Moreover, this court is not free to disregard the law of the case that "[e]vidence that tends to support any of [the] collateral conspiracies thus say little, if anything, about the existence of a conspiracy to charge *below market prices* in the American market over a period of two decades." 106 S. Ct. at 1361 (emphasis added).

Plaintiffs further argue that because the Supreme Court did not review their Antidumping Act claim, the Court failed to appreciate the full significance of the defendants' conduct in the Japanese market. They point to evidence tending to suggest a horizontal conspiracy to maintain supracompetitive prices in Japan, a market where the defendants are protected from competition by high entry barriers. The profits derived conspiratorily in the Japanese market, plaintiffs urge, permitted sales in the United States at dumping prices. However this court again is foreclosed by the Supreme Court's opinion. The Supreme Court stated flatly that "[e]vidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another." 106 S. Ct.

at 1361. The Court held, moreover, that defendants pricing practices did not suffice to create a genuine issue for trial. *Id.* at 1362. This reference plainly was to prices charged in the American market. The Supreme Court obviously was aware that these prices could be found to have been dumping prices.

Plaintiffs only real effort to refer to "other evidence" is to two expert reports, not previously considered, tending to explain why the defendants would have had a plausible motive to engage in the alleged conspiracy. These reports consist not of new evidentiary materials, but of explanations based upon the existing record. They amount to no more than an argument that the Supreme Court majority erred in its conclusion that no factfinder could draw an inference of conspiracy to price predatorily. We are not free to accept such an argument at this stage of the case, even from an expert. To the extent that the expert opinions might in themselves be considered evidentiary, they cannot be considered "other evidence" within the meaning of the Supreme Court's mandate. The case was not remanded to give the plaintiffs an opportunity to create a new summary judgment record.

We conclude, therefore, that there is no evidence other than that upon which we previously relied when we concluded that there were material fact issues regarding the existence of a predatory pricing conspiracy in the American market. The Supreme Court has already held this evidence is legally insufficient. Therefore the summary judgment on the Sherman Act claims must be affirmed.[1]

Since it is now the law of the case that there is insufficient evidence of a conspiracy to price predatorily in the American market, it is necessary to reconsider our disposition of the Antidumping Act claim. As we explained in our earlier opinion, the Antidumping Act of 1916 includes as a substantive element in the cause of action a proviso that the acts complained of "be done with the intent of destroying or injuring an industry in the United States." 15 U.S.C. §72 (1982). *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319, 322 (3d Cir. 1983). The plaintiffs assert that the Japanese manufacturers individually and collectively have engaged in illegal dumping. With respect

to the conspiracy claims, we earlier held "that the evidence supporting plaintiffs' theory that defendants entered into the alleged conspiracy also creates a genuine issue of fact as to whether defendants agreed to dump [consumer electronic products] on the United States market with the specific intent to destroy or injure an industry in the United States." *Id.* at 328. Since the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping Act conspiracy claim must fail with it. The Antidumping Act claims against individual Japanese manufacturers are equally vulnerable because we relied, in reversing summary judgment on those claims, on the evidence tending to show that the individual manufacturers joined in a conspiracy to sell in the American market at predatory prices. 723 F.2d at 329. There is no other evidence tending to show that any of the defendants still in the case dumped consumer electronic products with the required intent to injure or to destroy a United States industry.

The summary judgment in favor of each defendant will therefore be affirmed in all respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2080, 81-2331, 81-2332 and 81-2333

In Re:
JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION

ZENITH RADIO CORPORATION
and
NATIONAL UNION ELECTRIC CORPORATION,
Appellants

(D. C. MDL No. 0000189)

Present: SEITZ, GIBBONS and MESKILL, *Circuit Judges*

The court having considered the judgment of the United States Supreme Court in the above entitled matter, it is ORDERED:

(1) that the appellants Zenith Radio Corporation and National Union Electric Corporation shall within thirty (30) days of the date hereof file with this court a brief not exceeding fifty (50) pages addressing

(a) the appropriate disposition of the Sherman Act claims in light of the Supreme Court's direction on remand,

(b) whether the law with respect to permissible inferences of concert of action announced by that Court for Sherman Act claims applies to concert of action issues arising under other statutes such as the Antidumping Act of 1916, and if so what disposition should be made of the Antidumping Act claims;

(2) that the appellees shall within thirty (30) days of the filing of appellants' brief file a responding brief, not exceeding fifty (50) pages;

(3) that appellants may file a reply brief, not exceeding twenty (20) pages, within fifteen (15) days of the filing of appellees' responding brief.

For the Court,
JOHN GIBBONS
Judge

Dated: April 30, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2331

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D. C. MDL No. 189)

ZENITH RADIO CORPORATION,

Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-2451)

No. 81-2332

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D. C. MDL No. 189)

NATIONAL UNION ELECTRIC CORPORATION,

Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-3247)

No. 81-2333

In Re:

JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION

(D. C. MDL No. 189)

ZENITH RADIO CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.

(D. C. Civ. No. 74-2451)

NATIONAL UNION ELECTRIC CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.

(D. C. Civ. No. 74-3247)

MITSUBISHI ELECTRIC CORPORATION ("MELCO")
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and GIBBONS and MESKILL*, *Circuit Judges*

---

* Honorable Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

JUDGMENT

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered March 21, 1975, granting defendants' motions to dismiss Count V of the National Union Electric Corporation (NUE) complaint (D.C. Civ. No. 74-3247) and Count IV of the Zenith complaint (D.C. Civil No. 74-2451), be and the same is hereby affirmed.

3. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of the Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck & Co., on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act and under Section 7 of the Clayton Act, be and the same is hereby affirmed.

4. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451

Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

5. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, per paragraph (3) of this judgment. Costs to be taxed in favor of NUE and Zenith against the other twenty defendants enumerated in paragraph (4) of this judgment Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a).

ATTEST:
Clerk

December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2080

In Re:
JAPANESE ELECTRONIC
PRODUCTS ANTITRUST LITIGATION

ZENITH RADIO CORPORATION AND
NATIONAL UNION ELECTRIC CORPORATION,
Appellants

(D.C. MDL No. 189)

No. 81-2331

In Re:
JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION
(D.C. MDL No. 189)
ZENITH RADIO CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
Co., Ltd., et al.
(D.C. Civ. No. 74-2451)

No. 81-2332

In Re:
JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION
(D. C. MDL No. 189)

NATIONAL UNION ELECTRIC CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
Co., Ltd., et al.
(D.C. Civ. No. 74-3247)

No. 81-2333

In Re:
JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION
(D.C. MDL. No. 189)
ZENTH RADIO CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.
(D.C. Civ. No. 74-2451)
NATIONAL UNION ELECTRIC CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.
(D.C. Civ. No. 74-3247)
MITSUBISHI ELECTRIC CORPORATION ("MELCO"),
Appellant

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Present: SEITZ, *Chief Judge* and GIBBONS and MESKILL*,
Circuit Judges

*Honorable Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

JUDGMENT

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, be and the same is hereby affirmed insofar as it dismissed the National Union Electric Corporation (NUE) and Zenith claims under the Antidumping Act of 1916, 15 U.S.C. §72 (1976) against the Sony Corp., Sony Corp. of America, Sears, Roebuck & Co., and Motorola, Inc..

3. It is further ordered and adjudged that the order of the said District Court entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, insofar as it dismissed the NUE and Zenith dumping claims against these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247

Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

4. Costs will be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, and against the other twenty defendants enumerated in paragraph (3) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a).

ATTEST:
Clerk

December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2080

APPEAL FROM EASTERN DISTRICT OF PENNSYLVANIA

In Re:
JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION

ZENITH RADIO CORPORATION
AND
NATIONAL UNION ELECTRIC CORPORATION,
Appellants

No. Below: 723 F2d 319 (83) (D.C. No. 00189 MDL)
Judge Below: Edward R. Becker
Date of Judgment:
Notice of appeal filed: May 7, 1980; petition for leave to Commenced in D.C. November 29, 1974 file appeal.

PAGE FIVE
80-2080

* * *

1983 Dec. 5 Opinion of the Court (*Seitz*, Ch. J. Gibbons and Meskill, C.J.), filed (Covers 80-2080 & 81-2331/3)

Dec. 5 Judgment:

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 14, 1980 as amended by orders

entered April 23 and 25, 1980, be and the same is hereby affirmed insofar as it dismissed the National Union Electric Corporation (NUE) and Zenith claims under the Antidumping Act of 1916, 15 U.S.C. §72 (1976) against the Sony Corp., Sony Corp. of America, Sears, Roebuck & Co., and Motorola, Inc.

3. It is further ordered and adjudged that the order of the said District Court entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, insofar as it dismissed the NUE and Zenith dumping claims against these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247

Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

4. Costs will be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, and against the other twenty defendants enumerated in paragraph (3) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 80-2080, 81-2331/3)

Dec. 5 Opinion of the Court (Seitz, Ch. J. *Gibbons* and Meskill, C.J.), filed (Covers 81-2331/3)

Dec. 5 Judgment:

> 1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.
>
> 2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered March 21, 1975, granting defendants' motions to dismiss Count V of the National Union Electric Corporation (NUE) complaint (D.C. Civ. No. 74-3247) and Count IV of the Zenith complaint (D.C. Civil No. 74-2451), be and the same is hereby affirmed.

3. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of the Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck & Co., on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act and under Section 7 of the Clayton Act, be and the same is hereby affirmed.

4. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451

Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

5. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, per paragraph (3) of this judgment. Costs to be taxed in favor of NUE and Zenith against the other twenty defendants enumerated in paragraph (4) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 81-2331/3)

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2331

APPEAL FROM EASTERN DISTRICT OF PENNSYLVANIA

In Re:
JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION
(D.C. MDL No. 189)

ZENITH RADIO CORPORATION

Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.
(D.C. Civ. No. 74-2451)

No. Below: 723 F2d 319 (83), 723 F2d 238 (83), D.C. MDL No. 189; D.C. Civil No. 74-2451
Judge Below: Edward R. Becker
Date of Judgment:
Notice of appeal filed: May 27, 1981; Commenced in D.C. 11/29/74-MDL No. 189;

* * *

1983 Dec. 5 Opinion of the Court (*Seitz*, Ch. J. Gibbons and Meskill, C.J.), filed (Covers 80-2080 & 81-2331/3)

Dec. 5 Judgment:

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 14, 1980, as amended by orders

entered April 23 and 25, 1980, be and the same is hereby affirmed insofar as it dismissed the National Union Electric Corporation (NUE) and Zenith claims under the Antidumping Act of 1916, 15 U.S.C. §72 (1976) against the Sony Corp., Sony Corp. of America, Sears, Roebuck & Co., and Motorola, Inc.

3. It is further ordered and adjudged that the order of the said District Court entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, insofar as it dismissed the NUE and Zenith dumping claims against these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247

Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

4. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, and against the other twenty defendants enumerated in paragraph (3) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 80-2080, 81-2331/3)

Dec. 5 Opinion of the Court (Seitz, Ch. J. *Gibbons* and Meskill, C.J.) filed (Covers 81-2331/3)

Dec. 5 Judgment:

> 1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.
>
> 2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered March 21, 1975, granting defendants' motions to dismiss Count V of the National Union Electric Corporation (NUE) complaint (D.C. Civ. No. 74-3247) and Count IV of the Zenith complaint (D.C. Civil No. 74-2451), be and the same is hereby affirmed.

3. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of the Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck & Co., on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act and under Section 7 of the Clayton Act, be and the same is hereby affirmed.

4. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451

Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

5. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, per paragraph (3) of this judgment. Costs to be taxed in favor of NUE and Zenith against the other twenty defendants enumerated in paragraph (4) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 81-2331/3)

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2332

APPEAL FROM EASTERN DISTRICT OF PENNSYLVANIA

In Re:
JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION
(D.C. MDL No. 189)

NATIONAL UNION ELECTRIC CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.
(D.C. Civ. No. 74-3247)

No. Below: 723 F2d 319 (83), 723 F2d 238 (83),
D. C. MDL No. 189; D.C. Civil No. 74-3247
Judge Below: Edward R. Becker
Date of Judgment:
Notice of appeal filed: 5/27/81; Commenced in D.C. 11/19/74-MDL 189;

* * *

1983 Dec. 5 Opinion of the Court (*Seitz*, Ch. J. Gibbons and Meskill, C.J.), filed (Covers 80-2080 & 81-2331/3)

Dec. 5 Judgment:

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 14, 1980, as amended by orders

entered April 23 and 25, 1980, be and the same is hereby affirmed insofar as it dismissed the National Union Electric Corporation (NUE) and Zenith claims under the Antidumping Act of 1916, 15 U.S.C. §72 (1976) against the Sony Corp., Sony Corp. of America, Sears, Roebuck & Co., and Motorola, Inc.

3. It is further ordered and adjudged that the order of the said District Court entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, insofar as it dismissed the NUE and Zenith dumping claims against these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. No. 74-2451; 74-3247

Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

4. Costs will be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, and against the other twenty defendants enumerated in paragraph (3) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 80-2080, 81-2331/3)

Dec. 5 Opinion of the Court (Seitz, Ch. J. *Gibbons* and Meskill, C.J.), filed (Covers 81-2331/3)

Dec. 5 Judgment:

> 1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.
>
> 2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered March 21, 1975, granting defendants' motions to dismiss Count V of the National Union Electric Corporation (NUE) complaint (D.C. Civ. No. 74-3247) and Count IV of the Zenith complaint (D.C. Civil No. 74-2451), be and the same is hereby affirmed.

3. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered Apil 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of the Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck & Co., on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act and under Section 7 of the Clayton Act, be and the same is hereby affirmed.

4. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electirc Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451

Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

5. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, per paragraph (3) of this judgment. Costs to be taxed in favor of NUE and Zenith against the other twenty defendants enumerated in paragraph (4) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 81-2331/3)

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2333

APPEAL FROM EASTERN DISTRICT OF PENNSYLVANIA

In Re:
JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION
(D.C. MDL No. 189)

ZENITH RADIO CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.
(D.C. Civ. No. 74-2451)

NATIONAL UNION ELECTRIC CORPORATION,
Appellants

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.
(D.C. Civ. No. 74-3247)

MITSUBISHI ELECTRIC CORPORATION
("MELCO"),
Appellant

No. Below: 723 F2d 319 (83), 723 F2d 238 (83),
D.C. MDL No. 189; D.C. Civ. Nos. 74-2451 & 74-3247
Judge Below: Edward R. Becker
Date of Judgment:
Notice of appeal filed: 5/8/81; Commenced in D.C. 11/29/74-MDL No. 189;

* * *

1983 Dec. 5 Opinion of the Court (*Seitz*, Ch. J. Gibbons and Meskill, C.J.), filed (Covers 80-2080 & 81-2331/3)
Dec. 5 Judgment:

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, be and the same is hereby affirmed insofar as it dismissed the National Union Electric Corporation (NUE) and Zenith claims under the Antidumping Act of 1916, 15 U.S.C. §72 (1976) against the Sony Corp., Sony Corp. of America, Sears, Roebuck & Co., and Motorola, Inc.

3. It is further ordered and adjudged that the order of the said District Court entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, insofar as it dismissed the NUE and Zenith dumping claims against these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. No. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. Nos. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247

Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

4. Costs will be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, and against the other twenty defendants enumerated in paragraph (3) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 80-2080, 81-2331/3)

Dec. 5 Opinion of the Court (Seitz, Ch. J. *Gibbons* and Meskill, C.J.), filed (Covers 81-2331/3)

Dec. 5 Judgment:

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered March 21, 1975, granting defendants' motions to dismiss Count V of the National Union Electric Corporation (NUE) complaint (D.C. Civ. No. 74-3247) and Count IV of the Zenith complaint (D.C. Civil No. 74-2451), be and the same is hereby affirmed.

3. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of the Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck & Co., on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act and under Section 7 of the Clayton Act, be and the same is hereby affirmed.

4. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451

Mitsubishi Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

5. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, per paragraph (3) of this judgment. Costs to be taxed in favor of NUE and Zenith against the other twenty defendants enumerated in paragraph (4) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a). (Covers 81-2331/3)

* * *

Office of the Secretary
TELEVISION RECEIVING SETS, MONOCHROME AND COLOR, FROM JAPAN

Determination of Sales at Less Than Fair Value

Information was received on March 22, 1968, that television receiving sets, monochrome and color, from Japan were being sold at less than fair value within the meaning of the Antidumping Act 1921, as amended (19 U.S.C. 160 et seq.) (referred to in this notice as "the Act").

A "Withholding of Appraisement Notice" issued by the Commissioner of Customs was published in the FEDERAL REGISTER of September 4, 1970.

I hereby determine that for the reasons stated below, television receiving sets, monochrome and color, from Japan are being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Act.

Statement of reasons on which this determination is based. The information currently before the Bureau reveals that the appropriate basis of comparison is between purchase price or exporter's sales price and adjusted home market price.

Purchase price was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing, and other charges as applicable. The applicable Japanese commodity tax was added to this price.

Exporter's sales price was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions were made for inland freight in Japan, ocean freight and insurance, U.S. duty, brokerage charges, U.S. freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise.

Home market price was based on the delivered price to distributors in the home market. Appropriate deductions were

made for discounts and rebates granted for cash, quantities, and certain sales promotions. From the net price adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustments were also made for differences in the merchandise, and for differences in advertising and credit costs.

Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales.

The U.S. Tariff Commission is being advised of this determination.

This determination is being published pursuant to section 201(c) of the Act (19 U.S.C. 160(c)).

EUGENE T. ROSSIDES,
Assistant Secretary of the Treasury.

[F.R. Doc. 70-16531; Filed, Dec. 4, 1970; 11:49 a.m.]

FEDERAL REGISTER, VOL. 35, NO. 236 —
Saturday, December 5, 1970, Page 18549

PUBLIC INFORMATION

For release March 4, 1971

TARIFF COMMISSION FINDS TELEVISION RECEIVERS FROM JAPAN CAUSING INJURY

Dumping Duty to Be Imposed

The Tariff Commission today notified the Secretary of the Treasury that an industry in the United States is being injured by reason of imports from Japan of monochrome and color television receiving sets sold at less than fair value. The Commissioners voting were unanimous in their decision; Chairman Mize did not participate. As a result of the Commission's determination, television recievers from Japan sold at less than fair value will become subject to special dumping duties.

On December 4, 1970, the Treasury Department had advised the Commission that television receiving sets, monochome and color, from Japan are being, and are likely to be sold at less than fair value as defined in the Antidumping Act. The Treasury Department's advice was based on an investigation which it had instituted after receiving a complaint filed in March 1968 on behalf of the World Trade Committee, Parts Division, Electronic Industries Association. On receipt of Treasury's advice, the Commission had instituted an investigation (No. AA1921-66) to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established by reason of imports of such television receiving sets from Japan sold at less than fair value. A public hearing was held January 26-28, 1971.

U.S. imports of television receivers from Japan amounted to 3.3 million sets valued at $255 million in 1970. The imports from Japan accounted for about three-fourths of total U.S. imports of television sets in that year. Shipments of domestically produced television receivers amounted to about 7.8 million sets in 1970. Data on the value of domestic shipments in 1970 are not yet available, shipments in 1969 amounted to 8.9 million sets valued at $1.9 billion.

The Commission's report contains a statement of reasons for the determination. Copies of the report (TC Publication 367) are available upon request as long as the limited supply lasts. Requests should be addressed to the Secretary, U.S. Tariff Commission, 8th and E Sts., N.W., Washington, D.C. 20436.

UNITED STATES TARIFF COMMISSION
Washington

[AA1921-66]

TELEVISION SETS FROM JAPAN
Determination of Injury

The Assistant Secretary of the Treasury advised the Tariff Commission on December 4, 1970, that television receiving sets, monochrome and color, from Japan are being, and are likely to be, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended. In accordance with the requirements of section 201(a) of the Antidumping Act (19 U.S.C. 160(a)), the Tariff Commission instituted Investigation No. AA1921-66 to determine whether an industry in the United States is being, or is likely to be, injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

A public hearing was held on January 26-28, 1971. Notice of the investigation and hearing was published in the *Federal Register* of December 10, 1970 (35 F.R. 18768).

In arriving at a determination in this case, the Commission gave due consideration to all written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionaires, personal interviews, and other sources.

On the basis of the investigation, the Commission determined unanimously[1] that an industry in the United States is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

---

1. Chairman Mize did not participate in the determination.

Statement of Reasons

In the Commission's judgment, an industry in the United States is being injured by reason of the importation of television receivers from Japan, which are being sold at less than fair value (LTFV) within the meaning of the Antidumping Act, 1921, as amended.

In reaching this determination, three reasons have been persuasive: (1) Imports of television receivers from Japan, determined by the Treasury to have been sold at less than fair value, have increased and now supply a substantial share of the U.S. market; (2) the sellers of the LTFV Japanese receivers have for the most part undersold U.S. manufacturers of television sets in the domestic market; and (3) sales of the LTFV television sets have contributed substantially to declining prices of domestically produced television receivers.

The industry

The Commission has considered the injured industry to consist of the facilities in the United States for the production of television receivers. Television sets are currently manufactured in the United States by approximately 20 firms, most of which produce both monochrome and color sets in a wide range of screen sizes.

The imported product

Except for console-type television receivers, few of which are imported into the United States, imported television sets from Japan cover the broad range of types and sizes sold in the U.S. market. Both monochrome and color receivers in nearly all screen sizes are imported into the United States from Japan in large volume.

The U.S. market

Annual sales of television receivers in the United States ranged between 5.1 million and 7.6 million sets during the 1950's and early 1960's; they rose appreciably in the mid-1960's with

the advent of color television and averaged about 12.5 million sets in recent years. Sales in 1970 (12.2 million sets) were somewhat lower than those in the 2 preceding years (12.8-12.9 million sets).

In the past 3 years (1968-70), the U.S. market has been divided about equally between monochrome and color sets; annual sales of the monochrome sets have generally accounted for about 55 percent of total sales, and color sets, for 45 percent. Monochrome sets have been sold in substantial volume in a wide range of screen sizes, while color sets have been sold primarily in the larger screen sizes. In recent years, however, U.S. market demand for both monochrome and color receivers has shifted appreciably toward receivers having smaller screens. In 1970, for example, sales in the United States of monochrome receivers having screen sizes of 13 inches or less accounted for about 45 percent of total sales of monochrome sets, compared with 20 percent in 1965. Sales of large color receivers (screens of 20 inches or more) accounted for nearly 95 percent of total sales of color sets in 1965, but only 50 percent in 1970.

The competition in the U.S. market between domestic and Japanese television receivers has been sharpest in the middle screen sizes. Nearly all of the very large television sets sold in the United States have been produced domestically, while the great bulk of the very small sets have been imported. The market for receivers in sizes between those extremes, however, has been supplied by both Japanese and U.S. producers. Television sets in the middle sizes—i.e., sets having screens larger than 9 inches but less than 20 inches—accounted for more than half of the output of domestic receivers and nearly three-fourths of the imports of Japanese receivers in 1970. Thus, the competition in the U.S. market between the Japanese and the domestically produced middle-sized receivers affects a great part of U.S. production.

Data on the number of television sets produced in the United States and imported from Japan in 1965-70 are given in the following table.

Television receivers: U.S. production and imports from Japan, 1965-70

(Thousand units)

Description	1965	1966	1967	1968	1969	1970
Monochrome:						
Not over 13"						
U.S. production	1,166	1,376	949	1,016	831	640
Imports from Japan	575	632	791	1,164	1,594	1,724
Over 13" not over 16"						
U.S. production	511	610	405	408	478	329
Imports from Japan	141	158	110	158	212	206
Over 16"						
U.S. production	5,401	4,626	2,688	3,133	2,301	2,132
Imports from Japan	17	58	116	144	251	344
Color:						
Not over 16"						
U.S. production	33	233	332	444	550	558
Imports from Japan	24	13	121	404	467	492
Over 16"						
U.S. production	2,576	4,548	4,886	4,802	4,624	3,744
Imports from Japan	10	160	130	209	375	310

Market penetration

U.S. imports of Japanese television receivers have increasingly penetrated the U.S. market. In 1970, Japan supplied about 28 percent of the apparent U.S. consumption of television receivers, compared with 10 percent in 1965. In the more recent year, 36 percent of apparent consumption of monochrome receivers, and 16 percent of apparent consumption of color sets, consisted of Japanese receivers.

Substantial market penetration by Japanese television receivers has occurred in all of the middle screen sizes. Imports from Japan of monochrome sets having 10- to 13-inch screens, for example, increased rapidly in recent years; the imports supplied about 50 percent of the U.S. market in 1970, compared with 25 percent in 1965. Imports from Japan of monochrome sets having 17- to 19-inch screens accounted for 1 percent of the domestic market for such sets in 1965, but more than 15 percent in 1970. Aggregate U.S. production of monochrome receivers in the middle screen-size groups in 1970 was less than half of that in 1965,

evidencing both lost production and lost jobs. While this decline reflects in part the substitution of color for monochrome sets, it resulted in substantial part from the increasing imports of LTFV sets from Japan. In its investigation the Treasury found that the bulk of the Japanese monochrome sets having 10- to 16-inch screens, accounting for about a fourth of total supply of middle-sized monochrome receivers in the U.S. market, were sold at less than fair value.

Although the pattern of import penetration has been more erratic for color sets than for monochrome sets, imports from Japan of color sets have generally increased since 1965 and have taken a marked share of the U.S. market in the middle screen sizes. The Japanese share of the U.S. market for middle-sized color receivers was about 30 percent in 1970. In its investigation the Treasury found that virtually all of the Japanese color receivers having 14- to 19-inch screens, accounting for about a fifth of total supply of middle-size color receivers in the U.S. market, were sold at less than fair value.

Price effects

Information obtained by the Commission in the investigation indicates that the bulk of the television receivers imported from Japan have been sold in recent years in the United States at prices significantly lower than the prices of comparable domestic television receivers. Such underselling has been concentrated in certain of the middle screen sizes—the market area where competition between the Japanese and domestic sets has been most substantial and direct. The price differences were found to exist when comparing weighted average prices of Japanese-produced and domestically produced television receivers within narrow screen-size categories, as well as in instances where virtually identical sets (i.e., sets having comparable screens, cabinets, circuitry, and automatic tuning devices) could be compared. The LTFV margins were often equivalent to a substantial part of the margin of underselling in the United States; in other instances, the LTFV margin was found to be greater than the margin of underselling. In any event, the ability of the

Japanese suppliers to undersell domestic producers in the U.S. market appears to have been significantly enhanced as a result of the selling of Japanese sets at less than fair value. While margins of underselling in the U.S. market have generally diminished since 1967, perhaps in part as a response to the Treasury's investigation of allegations of LFTV [sic] sales, they have continued to be an important competitive factor in the market place.

Since 1967 the prices of major categories of domestically produced television receivers, both monochrome and color, have dropped substantially, particularly in the middle range of screen sizes. Weighted average prices of domestically produced sets in the middle screen sizes ranged as much as 25 percent lower in 1970 than in 1968. As indicated earlier, imports of television receivers from Japan at LTFV were a major factor in the U.S. market during that period, supplying a substantial and increasing share of apparent consumption. Under these circumstances, the LTFV imports clearly contributed in substantial measure to the price deterioration that has occurred in the domestic market for television receivers.

Conclusion

In the Commission's judgment, the imports of television receivers from Japan, sold at LTFV, have adversely affected the prices of comparable domestically produced receivers in the United States, and have caused substantial loss of sales by U.S. producers. Accordingly, we have unanimously determined that an industry in the United States is being injured by reason of such LFTV imports.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1453

Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL
CLERK

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,

Petitioners,

—v.—

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
WEIL, GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Respondents

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
McDERMOTT, WILL & EMERY
Washington, D.C.
Counsel for the Hitachi Respondents

DONALD F. TURNER
Washington, D.C.

HENRY T. REATH
DUANE MORRIS & HECKSCHER
Philadelphia, Pennsylvania
Counsel for the MELCO Respondents

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Respondents

DONALD J. ZOELLER
Counsel of Record
JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
Tel.: (212) 510-7000
Counsel for the Toshiba Respondents

LANCE GOTTHOFFER
MARKS MURASE & WHITE
New York, New York
Counsel for the Sharp Respondents

JAMES S. MORRIS
WHITMAN & RANSOM
New York, New York

KEVIN R. KEATING
WINDELS, MARX, DAVIES & IVES
New York, New York
Counsel for the Sanyo Respondents

April 10, 1987

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court's remand order barred the court of appeals from reconsidering its previous decision on petitioners' 1916 Antidumping Act claims, which had been explicitly premised on its now-overturned and vacated Sherman Act decision?

2. Whether this Court should reassess the voluminous record to determine whether the court of appeals, after reviewing this record for a second time, correctly concluded that there is no evidence sufficient to raise a triable issue with respect to the specific predatory intent required to support petitioners' claims of concerted and individual dumping under the 1916 Antidumping Act?

PARTIES TO THE PROCEEDING

Respondents are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.*

Petitioners are Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE").

---

* The statements required by Rule 28.1 of this Court are attached hereto.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
COUNTER-STATEMENT OF THE CASE	1
District Court Proceedings	2
Court Of Appeals Proceedings	3
Supreme Court Proceedings	4
Remand Proceedings	5
REASONS FOR DENYING THE PETITION	6
I. THE COURT OF APPEALS' AMENDMENT OF ITS 1916 ACT JUDGMENT WAS CORRECT AND RAISES NO ISSUE WARRANTING CERTIORARI OR MANDAMUS	6
II. PETITIONERS HAVE RAISED NO OTHER ISSUE MERITING A GRANT OF CERTIORARI.	10
A. The Court Of Appeals' 1916 Act Decision Is A Fact-Bound Holding Which Raises No Important Legal Issues	10
B. There Is No Conflict Among The Lower Courts Or With This Court's Precedents That Would Warrant A Grant of Certiorari	13

PAGE

C. Petitioners' "Trade Policy" Complaints Are Without Merit And Are Inappropriate For Consideration By The Courts..... 14

CONCLUSION 16

APPENDIX

STATEMENTS PURSUANT TO RULE 28.1 ..... 1a

TABLE OF AUTHORITIES

Cases: PAGE

American Iron and Steel Inst. v. *EPA*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) 8

Automatic Canteen Co. v. *FTC*, 346 U.S. 61 (1953) ... 12

Bywater v. *Matsushita Elec. Indus. Co.*, 1971 Trade Cas. (CCH) ¶ 73,759 (S.D.N.Y. 1971)..... 13

Diamond v. *Chakrabarty*, 447 U.S. 303 (1980) 15

Gondeck v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965)..... 8

Great Atl. & Pac. Tea Co. v. *FTC*, 440 U.S. 69 (1979) . 12

H. Wagner & Adler Co. v. *Mali*, 74 F.2d 666 (2d Cir. 1935)..... 13

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) ... 8

Isra Fruit Ltd. v. *Agrexco Agricultural Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986)..... 13

Jewel Foliage Co. v. *Uniflora Overseas Florida, Inc.*, 497 F. Supp. 513 (M.D. Fla. 1980)..... 13

Outboard Marine Corp. v. *Pezetel*, 461 F. Supp. 384 (D. Del. 1978) 13

Quern v. *Jordan*, 440 U.S. 332 (1979)..... 8

Schwimmer v. *Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979), *aff'd*, 673 F.2d 41 (2d Cir. 1980) ... 13

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981)..... 15

United States v. *Ohio Power Co.*, 353 U.S. 98 (1957) .. 8

Western Concrete Structures Co. v. *Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985)..... 13

PAGE

Statutes:

The Antidumping Act of 1916, 15 U.S.C. § 72 ..... *passim*

Clayton Act, Sec. 7, 15 U.S.C. § 18 ..... 2, 3

Robinson-Patman Act, Sec. 2(a), 15 U.S.C. § 13a(a) ... 2, 3

Sherman Act, Secs. 1 and 2, 15 U.S.C. §§ 1, 2 2

Wilson Tariff Act, Sec. 73, 15 U.S.C. § 8 2

19 U.S.C. § 1337 14

19 U.S.C. §§ 1671-1671h 14

19 U.S.C. §§ 1673-1677h 10, 14

19 U.S.C. § 2411 14

28 U.S.C. § 2106 8

Other Authorities:

W. Culbertson, *Commercial Policy in War Time and After* (1919) 11

U.S. Tariff Commission, *Dumping And Unfair Foreign Competition in the United States* (1919) 12

J. Viner, *Dumping: A Problem in International Trade* (1966 ed.) 11, 14

S.2517, 97th Cong., 2d Sess. (1982) 15

S.127, 98th Cong., 1st Sess. (1983) 15

S.1655, 99th Cong., 2d Sess. (1986) 15

S.361, 100th Cong., 1st Sess. (1987) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1453

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,

Petitioners,

—v.—

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

COUNTER-STATEMENT OF THE CASE

The petition portrays the court of appeals as reflexively dismissing petitioners' 1916 Act claims under the mistaken impression that this Court's mandate compelled that result.[1] In fact, however, the court of appeals carefully considered petitioners' dumping claims on their own merits. It rejected them for the sole and sufficient reason that they were unsupported by evidence of the requisite intent under the 1916 Act to injure or destroy a United States industry. This fact-bound ruling on the sufficiency of the record evidence plainly does not merit a grant of certiorari, particu-

---

1 The Antidumping Act of 1916, 15 U.S.C. § 72, is referred to herein as the "1916 Act."

larly in the absence of any conflict among the circuits or with this Court's prior decisions. That conclusion is evident upon a review of the prior proceedings in this case.

District Court Proceedings

As petitioners have emphasized throughout this sixteen year old litigation, the gravamen of their claims is that respondents allegedly engaged in a predatory conspiracy to:

> raise, fix and maintain artificially *high* prices for television receivers sold by [respondents] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.

106 S. Ct. 1348, 1351 (1986) (quoting 723 F.2d 238, 251 (1983)). According to petitioners, this alleged "unitary" conspiracy violated sections 1 and 2 of the Sherman Act, as well as the 1916 Act. Petitioners also allege individual violations of the 1916 Act, but these claims are based upon the same allegations of a predatory pricing conspiracy.[2]

In 1975, the district court denied a motion to declare the 1916 Act unconstitutionally vague, holding that the Act's specific intent provision, which requires a showing that the respondents engaged in continuous and systematic international price discrimination with a "*specific, predatory, anti-competitive intent*," saved the statute from constitutional infirmity. 402 F. Supp. 251, 259 (1975) (emphasis added). Thereafter, on April 14, 1980, the district court dismissed petitioners' 1916 Act claims as to all but a few products on the

---

2 As the district court found, "Zenith has, in colloquial terms, 'put all its eggs in one basket'—the 'unitary' conspiracy basket." 513 F. Supp. 1100, 1326, 1327 & n.396 (1981). Petitioners have never attempted to attribute separate injury or damages to alleged 1916 Act violations by any individual respondent; all of petitioners' injury and damage claims have been based solely upon the single predatory conspiracy that has been alleged. *Id.* at 1325-27 & n.396. Petitioners also claim violations of section 73 of the Wilson Tariff Act, section 2(a) of the Robinson-Patman Act and section 7 of the Clayton Act—but these claims too are based upon the same unitary conspiracy allegations. *Id.* at 1164, 1326, 1329.

ground that the consumer electronic products ("CEPs") sold by respondents in the United States were not "comparable" to those sold by respondents in Japan, as required by that statute. 494 F. Supp. 1190 (1980).

On March 27, 1981, the district court addressed all of petitioners' remaining claims. The court found the evidence insufficient to create a genuine issue of material fact as to the existence of the alleged unitary conspiracy to sell CEPs at high prices in Japan and at low, predatory prices in the United States. Accordingly, the district court granted summary judgment dismissing all of petitioners' conspiracy claims. 513 F. Supp. 1100 (1981). The district court also granted summary judgment against petitioners' remaining individual claims under the 1916 Act. 513 F. Supp. at 1316 n.372, 1334 n.411.[3]

Court Of Appeals Proceedings

On December 5, 1983, the court of appeals issued two opinions. First, it reversed the district court's conspiracy ruling, holding that there was sufficient evidence to create a triable issue as to the existence of the alleged predatory pricing conspiracy and to tie all defendants, except Sony, Sears, and Motorola, to that conspiracy. 723 F.2d at 316. The court of appeals affirmed the grant of summary judgment as to Sony, Sears, and Motorola. *Id.* at 319.

In its second opinion, the court of appeals reviewed the grant of summary judgment as to the 1916 Act claims. 723 F.2d 319 (1983). The court first overturned the district court's ruling that the products at issue were not comparable under the 1916 Act. *Id.* at 324-26. It then considered alternative grounds for

---

3 The district court stated that:

> plaintiffs have not demonstrated . . . the existence anywhere in the record of any evidence that would tend to show that any of the requisites of the 1916 Antidumping Act have been met, nor of any evidence that would create a genuine issue of material fact with respect to any conspiracy claims concerning such products.

513 F. Supp. at 1316 n.372. All of petitioners' individual claims under the Clayton and Robinson-Patman Acts were also dismissed. *Id.* at 1323-31.

sustaining the grant of summary judgment and expressly adopted the district court's conclusion that the 1916 Act was intended to prohibit only "anticompetitive" price discrimination and that the specific predatory intent requirement of the statute saved it from constitutional attack. *Id.* at 324, 326.

Next, the court of appeals considered petitioners' claims that the alleged predatory pricing conspiracy also violated the 1916 Act. The court of appeals adopted the same conclusions concerning the sufficiency of petitioners' 1916 Act conspiracy evidence as it had reached with respect to the identical evidence relied upon in support of petitioners' Sherman Act conspiracy claims. *Id.* at 328.

Finally, the court of appeals considered whether there was sufficient evidence to create a genuine issue of fact as to the specific predatory intent required by the 1916 Act. As to all defendants except Sony, Sears, and Motorola, the court of appeals ruled that this intent requirement could be satisfied by the evidence which it had found sufficient to raise a triable issue of the alleged predatory pricing conspiracy in its Sherman Act opinion. *Id.* Accordingly, the court of appeals reversed the grant of summary judgment in favor of respondents on petitioners' 1916 Act claims. *Id.* at 328-29. As for Sony, Sears, and Motorola, because the court of appeals found insufficient evidence to tie these defendants to the alleged predatory pricing conspiracy, the court searched the record for other evidence that could raise a triable issue as to specific predatory intent. Finding none, it affirmed the dismissal of all individual and conspiratorial 1916 Act claims against these three defendants. *Id.* at 328-30.

Supreme Court Proceedings

On March 26, 1986, this Court reversed the court of appeals' Sherman Act decision and remanded for further proceedings consistent with this Court's opinion. 106 S. Ct. at 1362. This Court rejected as insufficient the evidence proffered by petitioners in support of their conspiracy claims. Accordingly, it held that respondents were entitled to the reinstatement of

summary judgment against petitioners' Sherman Act claims unless the court of appeals, on remand, found "other evidence" in the record that was "sufficiently unambiguous" to permit a trier of fact to find that respondents engaged in the alleged predatory pricing conspiracy. *Id.* at 1362. This Court did not review the court of appeals' 1916 Act decision. *Id.* at 1352 n.3.

Remand Proceedings

On April 18, 1986, respondents moved the court of appeals to reconsider and amend its 1916 Act judgment because that judgment had been expressly premised upon the court of appeals' now-overturned ruling on the sufficiency of petitioners' evidence of the alleged predatory pricing conspiracy. Petitioners opposed this motion. The court of appeals issued an order directing the parties to address:

> a) the appropriate disposition of the Sherman Act claims in light of the Supreme Court's direction on remand, [and]
>
> b) whether the law with respect to permissible inferences of concert of action announced by that Court for Sherman Act claims applies to concert of action issues arising under other statutes such as the Antidumping Act of 1916, and if so what disposition should be made of the Antidumping Act claims.

(A-12).

After full briefing by the parties, the court of appeals first searched the record for any "other evidence" of the alleged predatory pricing conspiracy and found that no such evidence existed. (A-10). Accordingly, it reinstated summary judgment against all of petitioners' Sherman Act claims. (*Id.*) Petitioners do not seek review of that determination. Next, having found that there was "insufficient evidence of a conspiracy to price predatorily in the American market," the court of appeals concluded that it was necessary to reconsider its previous

disposition of petitioners' 1916 Act claims. The court of appeals found "no other evidence tending to show that any of the defendants still in the case dumped consumer electronic products with the required intent to injure or destroy a United States industry." It therefore reinstated summary judgment against both petitioners' conspiratorial and individual 1916 Act claims. (A-10-11).

Petitioners chose not to file a petition for rehearing. On March 11, 1987, they filed the instant petition for a writ of certiorari or, in the alternative, of mandamus.

REASONS FOR DENYING THE PETITION

Petitioners do not claim any conflict among the lower courts or with this Court's precedents calling for review by this Court. Nor do petitioners contest that the 1916 Act requires proof of a specific intent to injure or destroy an industry in the United States. (Pet. 7, 13). Petitioners simply mischaracterize the basis for the court of appeals' amendment of its 1916 Act judgment in an effort to obscure the fact that *petitioners are really asking this Court to review the court of appeals' fact-bound determination that there is no evidence in the record to establish the specific predatory intent required to support petitioners' 1916 Act claims.* This case-specific, fact-based ruling presents no issues worthy of review by this Court.

I. THE COURT OF APPEALS' AMENDMENT OF ITS 1916 ACT JUDGMENT WAS CORRECT AND RAISES NO ISSUE WARRANTING CERTIORARI OR MANDAMUS

Petitioners misstate the reasons why the court of appeals amended its 1916 Act judgment. Contrary to petitioners' assertion that the court of appeals believed that this Court's mandate compelled it to dismiss petitioners' 1916 Act claims (Pet. 10-11), the court of appeals recognized that this Court had not reviewed the court of appeals' 1916 Act decision. As

explained below, the court of appeals determined on its own to amend its prior 1916 Act judgment, which had been expressly predicated on its now-overturned Sherman Act decision.

The court of appeals asked for, and received, extensive briefing by the parties on the proper disposition of petitioners' 1916 Act claims. Following this briefing, and its comprehensive review of the evidence canvassed by the parties, the court of appeals: (i) reaffirmed its prior holding that the 1916 Act requires evidence of specific predatory intent (A-10); (ii) stated that its previous holding that there was sufficient evidence in the record to raise a triable issue as to such intent had been explicitly based upon its now-overturned ruling that there was sufficient evidence of the alleged conspiracy to price predatorily (*id.*); and (iii) concluded that since the evidence of a conspiracy to price predatorily was insufficient, and since there was no other evidence of specific predatory intent in the record, its 1916 Act rulings had to be amended. (*Id.*) As explained by the court of appeals:

> With respect to the [1916 Act] conspiracy claims, we earlier held 'that the evidence supporting plaintiffs' theory that defendants entered into the alleged conspiracy also creates a genuine issue of fact as to whether defendants agreed to dump [consumer electronic products] on the United States market with the specific intent to destroy or injure an industry in the United States.' [723 F.2d] at 328. Since the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping Act must fail with it. The Antidumping Act claims against individual Japanese manufacturers are equally vulnerable because we relied, in reversing summary judgment on those claims, on the evidence tending to show that the individual manufacturers joined in a conspiracy to sell in the American market at predatory prices. 723 F.2d at 329. *There is no other evidence tending to show that any of the defendants still in the case dumped consumer*

electronic products with the required intent to injure or destroy a United States industry.

(A-10-11) (emphasis added).

In reconsidering its 1916 Act decision, the court of appeals exercised its clear authority under 28 U.S.C. § 2106.[4] Petitioners claim this reconsideration "exceeded the scope of this Court's mandate" and cite as authority for this contention a fragment of the opinion in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). But petitioners omit the relevant part of *Sanford*, in which this Court stated that, on remand: "the Circuit Court may consider and decide any matters left open by the mandate of this court. . . ." *Id.* at 256. *See also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). Because petitioners' 1916 Act claims were "left open" by this Court, it was entirely appropriate for the court of appeals to reconsider them.

The court of appeals' reconsideration and amendment of its 1916 Act decision was thus proper in all respects. The court of appeals simply recognized that its earlier 1916 Act holding was no longer valid and concluded that, because there was no evidence in the record capable of establishing the predatory intent required by the 1916 Act, petitioners' claims under this statute had to be dismissed.

This outcome was foreshadowed by the court of appeals' previous affirmance of the dismissal of petitioners' 1916 Act claims against Sony, Sears, and Motorola (which petitioners neither challenged nor criticized). In that decision, the court of

---

4 That statute states that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106. *See American Iron and Steel Inst.* v. *EPA*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *see also Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957).

appeals, having found that there was insufficient evidence to tie these defendants to the alleged predatory pricing conspiracy, searched the record for any other evidence capable of satisfying the 1916 Act's specific predatory intent requirement. 723 F.2d at 329-30. Finding no such other evidence, the court of appeals dismissed petitioners' 1916 Act claims against these three defendants, explaining that:

> Plaintiffs have produced no direct evidence that Sony, Sears, or Motorola sold low-price CEPs in the United States with the intent to injure or destroy the CEP industry in this country. The only circumstantial evidence in this record that even marginally supports the inference that these three defendants each acted with specific predatory intent is evidence that they sold imported CEPs at substantially lower prices in the United States than the prices at which comparable CEPs were sold in Japan, and evidence that they knew that the other defendants were engaging in similar activity and that concerted dumping could injure or destroy the CEP industry in the United States. *Although this evidence might support a finding of general intent, we do not believe that this evidence creates a genuine issue of fact as to whether Sony, Sears, and Motorola each acted with the specific predatory intent required by the 1916 Act.*

Id. (emphasis added).

On remand, the court of appeals performed the same analysis and reached exactly the same conclusion with respect to respondents. (A-10-11). Nothing in this Court's mandate precluded this reconsideration and amendment of the court of appeals' prior 1916 Act judgment, and neither certiorari nor mandamus is warranted to review the propriety of the court of appeals' action.

II. PETITIONERS HAVE RAISED NO OTHER ISSUE MERITING A GRANT OF CERTIORARI

A. The Court Of Appeals' 1916 Act Decision Is A Fact-Bound Holding Which Raises No Important Legal Issues

In determining to reinstate summary judgment against petitioners' 1916 Act claims, the court of appeals searched the enormous record in this case for any evidence of specific predatory intent. The court concluded that "there is no evidence in the record supporting an inference of a predatory pricing conspiracy" by respondents, other than that rejected as insufficient by this Court, and that there "is no other evidence tending to show that any of the [respondents] dumped consumer electronic products with the required intent to injure or to destroy a United States industry." (A-6, A-11).

Petitioners do not dispute that evidence of such an intent is required to support a 1916 Act claim. (Pet. 7, 13). They could not, for the statute expressly requires an "intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce . . . in the United States." 15 U.S.C. § 72. The petition presents nothing more than petitioners' disagreement with the court of appeals' conclusion that such an intent cannot be established from the record in this case. This fact-bound conclusion does not warrant Supreme Court review.

In their efforts to escape the consequences of their failure of proof, petitioners confuse the broader concept of international price discrimination, dealt with under the administrative anti-dumping law, with the much narrower category of dumping with specific predatory intent prohibited by the 1916 Act.[5] As the court of appeals ruled, Congress made it clear, in enacting the 1916 Act, that the statute was carefully crafted to prohibit only "dumping" engaged in with a specific predatory motive. 723 F.2d

---

5 *Compare* 19 U.S.C. §§ 1673-1677h *with* 15 U.S.C. § 72.

at 325 n.4, 327-28. Petitioners' argument simply ignores this critical limit on the scope of the 1916 Act.[6]

Petitioners correctly note that the respected commentator Jacob Viner used the generic term "dumping" to refer to a wide variety of forms of international price discrimination—some anticompetitive and some not. (Pet. 15 n.14). They fail to point out, however, that Professor Viner also recognized that the 1916 Act was not intended to prohibit all of these different kinds of "dumping." In a portion of his treatise not quoted by petitioners, Professor Viner stated:

> The antidumping provision of the Act of 1916 has also been criticized on the ground that in confining its penalties to the common and systematic practice of predatory dumping it *fails to provide remedies . . . against other types of dumping which may be injurious to American industry though not predatory in intent or not provable to be so.* But these are not so much criticisms of the effectiveness of the measure in attaining its objectives as of the limited character of these objectives. *It was intended to reach only predatory dumping.* . . .

J. Viner, *Dumping: A Problem in International Trade* 245 (1966 ed.) (emphases added) (footnote omitted).[7] Indeed, Professor Viner noted that it was precisely because the 1916 Act prohibited

---

6 In proposing the legislation which ultimately became the 1916 Act, Secretary of Commerce Redfield stated that the statute "should not prohibit the pricing practices of normal competition, but only those based on predatory motive." 723 F.2d at 325 n.4. Protectionist-minded opponents tried to eliminate the predatory intent clause from the 1916 Act, arguing that it would so emasculate the antidumping law as to provide little or no protection to American industry. *See* 53 Cong. Rec. 13080 (1916) (Statement of Sen. Penrose); 53 Cong. Rec. App. 1476 (1916) (Statement of Rep. Denison); 53 Cong. Rec. App. 1535 (1916) (Statement of Rep. Bacharach); 53 Cong. Rec. 13490 (1916) (Statement of Sen. Colt); 53 Cong. Rec. App. 1470 (1916) (Statement of Rep. Mott). But the House expressly rejected this proposal, reaffirming its desire to limit the prohibited behavior to that engaged in with a specific predatory intent. 53 Cong. Rec. 10751 (1916).

7 *See also* W. Culbertson, *Commercial Policy in War Time and After* 153 (1919).

only predatory dumping that Congress later enacted the very different and broader administrative remedies contained in the 1921 Antidumping Act (now contained in Title VII of the Tariff Act of 1930, as amended), which did not contain *any* intent proviso. *Id.* at 258-59.[8]

The predatory intent requirement of the 1916 Act is necessary because that statute provides for criminal sanctions and a treble damage remedy. The legislative framework makes it clear that, although Congress was willing to provide administrative remedies for dumping without any intent requirement, it would permit the severe penalties provided in the 1916 Act *only* upon a showing of specific predatory intent.

Indeed, to ignore the 1916 Act's predatory intent requirement, as petitioners propose, would bring that statute into fundamental conflict with antitrust policies by failing to distinguish between pro-competitive and anticompetitive pricing behavior.[9] Both the district court and the court of appeals recognized that the 1916 Act is rooted in antitrust principles. 402 F. Supp. at 262; 494 F. Supp. at 1197, 1201, 1215, 1220; 723 F.2d at 324-25 & n.4.

In sum, petitioners' entire discussion of the economic motivations for non-predatory dumping is irrelevant. Petitioners fail to recognize the critical differences between the broad category of "dumping" dealt with in the protectionist administrative antidumping law—which is not at issue in this case—and the much more limited predatory and anticompetitive dumping prohibited by the 1916 Act.[10] The only issue presented by the petition is

---

8 *See also* U.S. Tariff Commission, *Dumping and Unfair Foreign Competition in the United States* 20, 33-34 (1919).

9 *Cf. Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (interpretations of the domestic price discrimination law should not " 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation' ") (quoting *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953)).

10 In this connection, petitioners mischaracterize, and attach as appendices to their petition, certain administrative determinations against respondents under the 1921 Antidumping Act, without pointing out that there is no intent requirement contained in that statute. (Pet. 18, A-42).

whether the court of appeals correctly concluded, after thoroughly reviewing the record for a second time, that there is no evidence of the specific predatory intent required by the 1916 Act. That conclusion can hardly be questioned since it is obvious that such a predatory intent cannot be inferred from what *petitioners now concede to be "profitable" pricing behavior by respondents in the United States*. (Pet. 17).[11] The court of appeals canvassed the entire record for any evidence which would convert such profitable pricing into evidence of predatory intent and found none. There is no reason for this Court to review that fact-bound determination.

B. There Is No Conflict Among The Lower Courts Or With This Court's Precedents That Would Warrant A Grant Of Certiorari

Petitioners do not claim that there is a conflict among the lower courts with respect to the issues the petition seeks to raise. This is not surprising since, in the seventy-one year history of the 1916 Act, there have been only two reported appellate decisions (other than those in this case) under that statute: a 1935 opinion on a discovery issue[12] and a 1985 opinion on a standing question.[13] District court opinions construing the 1916 Act are also extremely scarce and of no relevance to the petition.[14]

---

11 Petitioners' concession that respondents charged "profitable" U.S. prices belies their earlier assertions of "long term, below-cost sales," upon which four Justices apparently relied, at least in part, in dissenting from this Court's conspiracy decision. 106 S. Ct. at 1366 (White, J., dissenting).

12 *H. Wagner & Adler Co.* v. *Mali*, 74 F.2d 666 (2d Cir. 1935).

13 *Western Concrete Structures Co.* v. *Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985).

14 *Isra Fruit Ltd.* v. *Agrexco Agricultural Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986) (standing); *Jewel Foliage Co.* v. *Uniflora Overseas Florida, Inc.*, 497 F. Supp. 513 (M.D. Fla. 1980) (standing); *Schwimmer* v. *Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979), *aff'd*, 637 F.2d 41 (2d Cir. 1980) (standing); *Outboard Marine Corp.* v. *Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (requirement of foreign sale); *Bywater* v. *Matsushita Elec. Indus. Co.*, 1971 Trade Cas. (CCH) ¶ 73,759 (S.D.N.Y. 1971) (standing).

Similarly, petitioners do not claim that the court of appeals' 1916 Act decision conflicts with Supreme Court precedent. No such assertion could be made, since this Court has never considered a 1916 Act claim. In view of the small amount of litigation commenced under the 1916 Act over the last seventy years, and the complete absence of conflicting authority, review by this Court is plainly unwarranted.

C. Petitioners' "Trade Policy" Complaints Are Without Merit And Are Inappropriate For Consideration By The Courts

Petitioners criticize the court of appeals' 1916 Act decision for allegedly leaving U.S. industry with no effective remedy against "unfair competitive practices." (Pet. 19). This criticism is not only wrong on the merits, but is directed to the wrong forum.

First, the fact that petitioners were unable to produce any evidence to satisfy the 1916 Act's specific predatory intent requirement will not have any adverse effect on future 1916 Act plaintiffs. A finding that there has been a failure of proof in one case does not mean that there is no effective remedy for those who can prove their claims.

Second, the 1916 Act is far from the only remedy available to U.S. industry for responding to alleged unfair foreign competition. Congress has enacted numerous statutes, containing a variety of trade remedies, to address such concerns.[15] Most notably, petitioners do not even mention the administrative mechanisms created by the 1921 Antidumping Act to impose duties for the type of non-predatory dumping discussed in the petition. As Professor Viner explained, that statutory scheme was expressly enacted to reach "dumping" activity beyond the purview of the narrow category of predatory conduct condemned by the 1916 Act. *See* J. Viner, *Dumping: A Problem in International Trade* 245 (1966 ed.).

---

15 *See, e.g.*, 19 U.S.C. §§ 1671-1671h (countervailing duty); 19 U.S.C. §§ 1673-1677h (antidumping duty); 19 U.S.C. § 1337 (unfair practices in imports); 19 U.S.C. § 2411 (unfair trade practices).

Finally, petitioners' complaint that U.S. industry requires additional remedies against dumping is inappropriate for judicial consideration. This Court has repeatedly emphasized that the judiciary should not be asked to resolve policy issues which properly belong within the purview of the political branches of government:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980)).

The 1916 Act has been on the books, unchanged, for more than seventy years. It was originally enacted with and still contains a requirement of specific predatory intent. Since Congress has been unwilling to amend the statute to make it applicable to other kinds of "dumping," this Court should not countenance any request to do so.[16]

---

16 Bills seeking to weaken or eliminate the 1916 Act's predatory intent requirement have been proposed since at least 1982, but none of them has been enacted. *See, e.g.*, S.2517, 97th Cong., 2d Sess. (1982), S.127, 98th Cong., 1st Sess. (1983), S.1655, 99th Cong., 2d Sess. (1986). This issue is once again before the 100th Congress. *See* S.361, 100th Cong., 1st Sess. (1987).

CONCLUSION

After sixteen years of litigation, the court of appeals reviewed the entire record in this case and held that petitioners have failed to produce legally sufficient evidence to support their 1916 Act claims. Petitioners present no valid reason for this Court to review that fact-bound determination. Accordingly, the petition for a writ of certiorari or mandamus should be denied.

April 10, 1987

Respectfully submitted,

Ira M. Millstein
A. Paul Victor
Jeffrey L. Kessler
Debra J. Pearlstein

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, NY 10153
Tel.: (212) 310-8000

Raymond T. Cullen

MORGAN LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
Tel.: (215) 963-5650

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co., Ltd.; and Matsushita Electronics Corporation

Donald J. Zoeller
Counsel of Record

John L. Altieri, Jr.
Harold G. Levison
Bart T. Schectman

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, NY 10038
Tel.: (212) 510-7000

Patrick T. Ryan

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, PA 19107
Tel.: (215) 988-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

Carl W. Schwarz
Michael E. Friedlander
William H. Barrett
Stephen P. Murphy

McDERMOTT, WILL
& EMERY
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
Tel.: (202) 887-8000

Lawrence R. Walders

GRAHAM & JAMES
1050 17th Street, N.W.
Washington, D.C. 20036
Tel.: (202) 463-0800

Charles J. Bloom

KLEINBARD, BELL
& BRECKER
30 South 17th Street
Philadelphia, PA 19103
Tel.: (215) 568-2000

Attorneys for Hitachi Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

Jiro Murase
Gene Y. Matsuo
Lance Gotthoffer
Gary A. Adler
Lawrence M. Harnett

MARKS MURASE & WHITE
400 Park Avenue
New York, NY 10022
Tel.: (212) 832-3333

Matthew J. Broderick

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, PA 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

Henry T. Reath
Frank A. Luchak
Judith N. Renzulli

DUANE MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
Tel.: (215) 854-6300

John T. Dolan
Arnold B. Calmann
Christine A. Amalfe

CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
Gateway One
Newark, NJ 07102
Tel.: (201) 622-2235

Hoken S. Seki

SEKI & JARVIS
520 Madison Avenue
New York, NY 10022
Tel.: (212) 759-2303

Donald F. Turner

WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
Tel.: (202) 663-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

Charles F. Schirmeister
Peter C. Williams

REID & PRIEST
40 West 57th Street
New York, NY 10019
Tel.: (212) 603-2000

Stephen W. Armstrong

MONTGOMERY MCCRACKEN WALKER & RHOADS
Three Parkway
Philadelphia, PA 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

James S. Morris
Michael S. Press

WHITMAN & RANSOM
200 Park Avenue
New York, NY 10166
Tel.: (212) 351-3000

Kevin R. Keating

WINDELS, MARX,
DAVIES & IVES
51 West 51st Street
New York, NY 10019
Tel.: (212) 977-9600

Charles J. Bloom

KLEINBARD, BELL
& BRECKER
30 South 17th Street
Philadelphia, PA 19103
Tel.: (215) 568-2000

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric Inc.; and Sanyo Manufacturing Corporation

APPENDIX

STATEMENTS PURSUANT TO RULE 28.1

Rule 28.1 Statement of Respondents Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., and Matsushita Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., and Matsushita Electronics Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly owned, publicly-traded foreign affiliates of Respondents Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., and/or Matsushita Electronics Corporation: Matsushita Communication Industrial Co., Ltd.; Matsushita Refrigeration Company; Victor Company of Japan; Kyushu Matsushita Electric Co., Ltd.; Matsushita Seiko Co., Ltd.; Matsushita Kotobuki Electronics Industries, Ltd.; Matsushita Electric Works, Ltd.; Miyata Industry Co., Ltd.; National House Industrial Co., Ltd.; Asahi National Lighting Corporation Ltd.; Wakayama Precision Company; Precision Electronics Corporation; and Matsushita Electric Co., (Malaysia) Bhd.

Rule 28.1 Statement of Respondents Toshiba Corporation and Toshiba America Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Toshiba Corporation and Toshiba America Inc. submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Toshiba Corporation and/or Toshiba America Inc.: Toshiba

Machine Co., Ltd.; Toshiba Ceramics Co., Ltd.; Toshiba Steel Tube Co., Ltd.; Tokyo Optical Co., Ltd.; Toshiba Glass Co., Ltd.; Toshiba Tungaloy Co., Ltd.; Maroon Electronics Co., Ltd.; Tokyo Electric Co., Ltd.; Toshiba Medical Systems Co., Ltd.; Nishishiba Electric Co., Ltd.; Shibaura Engineering Works Co., Ltd; Kitashiba Electric Co., Ltd.; Toshiba Engineering & Construction Co., Ltd.; Onkyo Corporation; Toshiba Electronic Systems Co., Ltd.; Toshiba Components Co., Ltd.; Toshiba Silicone Co., Ltd. Semp Toshiba Amazonas S.A. (Brazil); Toshiba Anand Batteries Ltd. (India); Ceylon Bulbs & Electricals Ltd. (Sri Lanka); Thai Toshiba Electric Industries Co., Ltd. (Thailand); Thai Toshiba Fluorescent Lamp Co., Ltd. (Thailand); Thai Toshiba Lighting Co., Ltd. (Thailand); Mycom Bhd. (Malaysia); Taiwan Television Enterprise Ltd. (Taiwan); Korea Electronics Co., Ltd. (Korea); Orion Electric Co., Ltd. (Korea); Han Kwang Electric Co., Ltd. (Korea); Leechun Electric Co., Ltd. (Korea); Tatung Co. (Taiwan); Taiwan Fluorescent Lamp Co., Ltd. (Taiwan); Toshiba de Panama S.A. (Panama); Toshiba Medical do Brasil Ltda. (Brazil); Toshiba International Company Ltd. (United Kingdom); Toshiba Medical Systems Ltd. (United Kingdom); Toshiba Medical Systems nv/sa (Belgium); Toshiba Medical Systems G.m.b.H. (West Germany); Toshiba (Schweiz) AG (Switzerland); Toshiba Medical Systems AG (Switzerland); Toshiba Medical Systems SrL (Italy); Toshiba Medical Systems S.A. (Spain); Man On Toshiba Limited (Hong Kong); Toshiba Electronics Taiwan Corp. (Taiwan); Toshiba Thailand Company Ltd. (Thailand); Toshiba Sales and Services Sdn. Bhd. (Malaysia); Toshiba International Corporation Pty., Ltd. (Australia); Toshiba Semiconductor Inc. (U.S.A.); Industria Mexicana Toshiba S.A. (Mexico); Toshiba do Brasil S.A. (Brazil); Toshiba Westinghouse Electronics Corp. (U.S.A.); International Fuel Cells Corp. (U.S.A.); Toshiba Information Systems (UK) Ltd. (United Kingdom); Toshiba Consumer Products (France) S.A.; Toshiba Systèmes France S.A. (France); Compagnie Européenne de Fabrication d'Enceintes (France); and Micro Ondes S.A.R.L. (France).

Rule 28.1 Statement of Respondents Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and/or Hitachi Sales Corporation of America; Hitachi Cable, Ltd.; Hitachi Metals, Ltd.; Hitachi Chemical Co., Ltd.; Hitachi Construction Machinery Co., Ltd.; Hitachi Maxell, Ltd.; Babcock-Hitachi, K.K.; Hitachi Denshi, Ltd.; Japan Servo Co., Ltd.; Hitachi Kiden Kogyo, Ltd.; Hitachi Medical Corporation; Nippo Tsushin Kogyo Co., Ltd.; Asahi Kogyo Co., Ltd.; Hitachi Credit Corporation; Hitachi Plant Engineering & Construction Co., Ltd.; Nissei Sangyo Co., Ltd.; Nippon Business Consultant Co., Ltd.; Hitachi Printing Co., Ltd.; Hitachi Electronic Devices (Singapore) Pte., Ltd.; Hitachi Consumer Products (S) Pte., Ltd.; Hitachi Semiconductor (Malaysia) Pte., Ltd.; Hitachi Sales Australia Pty., Ltd.; High Voltage Breakers, Inc.; Hitachi Instruments, Inc.; Maxell America Inc.; Hitachi Transport System, Ltd.; Hitachi Construction Machinery (America), Corp.; and Hitachi France (Radio-TV Electro-Manager) S.A.

Rule 28.1 Statement of Respondents Mitsubishi Electric Corporation (MELCO) and Mitsubishi Electric Sales America, Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc., submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded for-

eign affiliates of Respondents Mitsubishi Electric Corporation and/or Mitsubishi Electric Sales America, Inc.: Nagoya Mitsubishi Electric Equipment Sales (Inc.); Kansai Mitsubishi Electric Products Sales (Inc.); Hokuriku Mitsubishi Electric Products Sales (Inc.); Bingo Electronic Computation Center (Inc.); Ryoei Facilities Service (Inc.); Sowa (Inc.); Meldas System Engineering (Inc.); Shinbishi Electric (Inc.); Melco Overseas Service (Inc.); Kodensha (Inc.); Shimada Rika Industry (Inc.); Toyo Electric (Inc.); Nakayama Machinery (Inc.); Ryowa Trade and Industry (Inc.); Ryoden Elevator Facilities (Inc.); Mitsubishi Space Software (Inc.); Taku Industry (Inc.); Mecom Okitac Systems (Inc.); Toyo Machinery Industry Works (Inc.); Ryoko Computation Center (Inc.); Melcom Service (Inc.); Tanto Kosan (Inc.); Daito Industry (Inc.); Tyoden Industrial Machinery; Service Engineering (Inc.); Mitsubishi Industrial Software (Inc.); Sanwa Electric (Inc.); Melco de Mexico S.A. de C.V.; Ascenseurs Mitsubishi France S.A.; United Electronic Engineering Corp. (pte) Ltd.; Ryoden (Singapore) Pte. Ltd.; Ryoden Merchandising Co., Ltd.; Melco de Colombia Ltda.; Mitsubishi Electric Saudi Ltd.; Kanagawa Electric (Inc.); Daiichi Electric Industry (Inc.); Shizuki Electric Works (Inc.); Ryoden Trading (Inc.); Nippon Kentetsu (Inc.); and Shin Yeong Electric Corporation.

Rule 28.1 Statement of Respondents Sharp Corporation and Sharp Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Sharp Corporation and Sharp Electronics Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Sharp Corporation and/or Sharp Electronics Corporation: Hycom, Inc.; Sampo Corp.; and Sharp Electronics Sales Corp.

Rule 28.1 Statement of Respondents Mitsubishi Corporation and Mitsubishi International Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Mitsubishi Corporation and Mitsubishi International Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Mitsubishi Corporation and/or Mitsubishi International Corporation: Japan Aircraft Maintenance (America), Inc.; Mitsubishi International Warehouse Corporation; Coilplus, Inc.; Hishi Plastics USA, Inc.; Mitsubishi Acceptance Corporation; MIC/MAC Corporation; Mitsubishi Engine North America Inc.; Nature Snak Inc.; Memory Tech Inc.; Sushiden America, Inc.; Nihon Shokuhin Kakoo K.K.; Dahlia Mining Co., Ltd.; Chino Mines Company; Diamond Vision Inc., U.S.A.; Mitsubishi Motor Sales of America, Inc.; Machinery Distribution, Inc.; Dosanko Foods Inc.; Nitto Seifun K.K.; Chuukyoo Coca Cola Bottling; G.S. Steel Co., Ltd.; Mitsubishi Motors Australia, Ltd.; and Crestbrook Forest Industries, Ltd.

Rule 28.1 Statement of Respondents Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., and Sanyo Manufacturing Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned publicly-traded foreign affiliates of Respondents Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and/or Sanyo Manufacturing Corporation: Sanyo E & E Corporation; Sanyo

Business Systems Corporation; Tocabi America Corporation; Icon Systems & Software, Inc.; Sanyo Industries (Malaysia) Bhd. (Malaysia); and Autocrat Sanyo Holdings (New Zealand). In addition, Sears, Roebuck and Co. owns 25.4% share of the stock of Respondent Sanyo Manufacturing Corporation.

Supreme Court, U.S.
FILED
APR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1453

ZENITH RADIO CORPORATION AND
NATIONAL UNION ELECTRIC CORPORATION
Petitioners

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF SEMICONDUCTOR INDUSTRY ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

JOSEPH R. CREIGHTON
Chairman, Law Committee
Semiconductor Industry Association
Counsel of Record
1601 S. Miramar Avenue
Indialantic, Florida 32903
(305) 727-9137

WILLIAM H. DANA
THOMAS DUNLAP, JR.
DARYL G. HATANO
Counsel for
Semiconductor Industry Association

April 9, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE QUESTIONS	2
II. THE SUPREME COURT'S DECISION ON CERTIORARI IN THE SHERMAN ACT CASE IS INHERENTLY INAPPLICABLE TO THE SEPARATE ANTIDUMPING CASE, BOTH BECAUSE ONLY ANTITRUST ISSUES WERE REVIEWED AND BECAUSE THE ELEMENTS OF THE TWO STATUTES ARE NOT COMPARABLE	4
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
CASES	
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation 475 U.S. ___, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)	1,2
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)	4
Turner v. United States, 396 U.S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970)	7
United States v. Patten, 226 U.S. 525, 543; 33 S. Ct. 141, 145; 57 L. Ed. 333, 342 (1913)	7
United States v. United States Gypsum Co., et al., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)	7
STATUTES	
Revenue (Antidumping) Act of 1916; 15 U.S.C. § 72	1,2,5,6
Sherman Act, 15 U.S.C. § 1	1

BRIEF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Semiconductor Industry Association submits this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The Semiconductor Industry Association ("SIA") is a non-profit association which represents over fifty manufacturers of semiconductor devices, accounting for over 95% of all semiconductors fabricated in the United States. Revenues of the U.S. based industry reached $11.4 billion in 1986. These microelectronic devices are not only the heart of many emerging industries, such as telecommunications and personal computers, but also the key to the competitiveness of many traditional industries, such as automobiles and appliances.

Neither SIA nor any member company has a direct interest in the outcome of this litigation [1] and SIA takes no position as to whether petitioners could prove their case at trial. However, SIA and several of its member companies are involved directly with the antidumping laws of the United States both in the past and presently. SIA is concerned with what we believe is a misinterpretation by the Court of Appeals, and a misapplication of a 1916 Antidumping Act case, of this Court's antitrust decision in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation,* 475 U.S. ____, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In the antidumping laws, Congress had a wholly different purpose and used very different language from that of the Sherman Act, 15 U.S.C. § 1. Nevertheless, the Court of Appeals believed that it was bound by this Court's decision, not only in the antitrust case, but also in considering petitioners' private action under the Antidumping Act of 1916, 15 U.S.C. § 72. If that decision below is allowed to stand, the legislative purposes as to dumping will almost certainly be frustrated.

[1] This brief is submitted by the Association and does not necessarily state fully the views of every member.

SIA's concern is magnified by reason of the facts that the separate dumping case decisions by both courts below were not before this court on certiorari; this court expressly limited its decision to the antitrust issues; and, in any case, the decision was a very close one (5-4). In view of the present importance of the antidumping laws, and the very limited number of judicial interpretations of the 1916 Act, the application of antitrust principles without careful consideration of the differences in the statutes will create serious confusion and raise obstacles to enforcement of the antidumping laws, to the detriment of the members of SIA and many other American companies.

SUMMARY OF ARGUMENT

1. The Court of Appeals' decision in favor of petitioners was not reviewed by this Court on certiorari and must remain standing.

2. This Court's decision on antitrust issues was not a mandate to the Court of Appeals applicable to the separate antidumping case.

3. The elements of antidumping and antitrust violations are different, making it inappropriate to apply this Court's antitrust case to the antidumping case.

4. The requisites of the 1916 Antidumping Act as to the fact of dumping and injury to the industry are virtually undisputed, and the issue of intent is supported by evidence at least sufficient to defeat summary judgment.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE QUESTIONS.

This case involves the propriety of the decision of the Court of Appeals for the Third Circuit that a "law of the case" created by this Court's 5-4 decision upon petitioners' antitrust action in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. ___, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), was also applicable to the petitioners' action under

the Antidumping Act of 1916, 15 U.S.C. § 72. The District Court had granted summary judgment in two separate decisions relating to petitioners' action under the Sherman Act and petitioners' action under the Antidumping Act of 1916, respectively. The Court of Appeals reversed both decisions in separate opinions, but reserved final judgment pending disposition of a petition for writ of certiorari to this court which was limited to the action under the Sherman Act. This Court's decision was likewise limited to the Sherman Act issue, and specifically to ". . . the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." 475 U.S. at ___, 106 S. Ct. at 1351, 89 L. Ed. 2d at 546.

On remand of this Court's Sherman Act decision, the Court of Appeals did not review its prior dumping decision, nor did it compare the standards of law or evidence applicable to the antitrust action, on the one hand and the dumping action on the other. Instead, it concluded that this Court had established a "law of the case" on the antitrust issue which was equally applicable to petitioners' antidumping action.

In view of the uncontroverted evidence in the record in the *Matsushita* litigation that the foreign manufacturers had been found by the United States Government to have violated the antidumping laws of the United States with respect to consumer electronic products, and in view of the fact that several of the same companies have recently been in violation of the dumping laws with respect to semiconductors, SIA and many of its member companies have a direct interest in preventing the Court of Appeals' decision from destroying effectively the important private antidumping remedy established by Congress. It is essential to eliminate any possible implication that this Court has, by its *Matsushita* decision, established the standards of law and proof applicable in 1916 Antidumping Act cases.

II. THE SUPREME COURT'S DECISION ON CERTIORARI IN THE SHERMAN ACT CASE IS INHERENTLY INAPPLICABLE TO THE SEPARATE ANTIDUMPING CASE, BOTH BECAUSE ONLY ANTITRUST ISSUES WERE REVIEWED AND BECAUSE THE ELEMENTS OF THE TWO STATUTES ARE NOT COMPARABLE.

In *Matsushita,* this Court appears to have held that,

(i) petitioners could not base their case upon a Japanese price conspiracy because American antitrust laws do not regulate foreign competitive conditions;

(ii) petitioners could not rely upon proof that the Japanese manufacturers conspired to maintain minimum prices in U.S. markets because, although that would be an antitrust violation, petitioners would not have been damaged thereby;

(iii) petitioners could not rely upon non-price restrictions such as the "five-company rule", or "check prices," even though they are harmful to competition, because they would actually benefit competitors; and

(iv) evidence of these conspiracies, which could not be the basis for petitioners' action directly, could not be viewed as "direct evidence" of a conspiracy sufficient to overcome principles established in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed. 2d 775 (1984), that a conspiracy cannot be inferred from activity which is as consistent with independent action as with conspiracy in the absence of some direct evidence of conspiracy.

SIA respectfully submits that the decision of this Court relating to very important principles of antitrust law should not be automatically applied outside of the antitrust context, particularly when the Court was sharply divided. Although this

proposition would appear to be self-evident, it is particularly applicable because of the essential differences between the elements of violations of antitrust laws and antidumping laws.

No attempt is here made to elaborate on all these differences since no case has been found even discussing the potential comparison of elements of these respective statutes. Moreover, the District Court decided the cases separately; the Court of Appeals decided the cases separately; and this Court was not presented with the antidumping issue and did not attempt to deal with it. If the essential elements of antitrust cases and antidumping cases are to be made identical, a decision to do that should be made expressly after careful comparison of the language and purposes of each statute. The status of the current case seems to require that this be done by a decision of this Court, or by a mandate addressed to the Court of Appeals to reinstitute its prior decision in the antidumping case in favor of petitioners. The petitioners should be allowed a trial on the dumping case which was denied them by summary judgment but was ordered by the Court of Appeals' first decision which was not reviewed by this Court.

The difference in the 1916 Act is evident on its face. Whereas this Court in *Matsushita* determined that petitioners must prove a conspiracy to monopolize the American market for television receivers in order to establish an antitrust violation, in a dumping context petitioners need only prove the fact of dumping (done independently or by conspiracy) with intent to injure or destroy an American industry. The record indicates that the dumping was already proved by United States Government action. For purposes of the 1916 Antidumping Act, the American industry did not have to be destroyed, or virtually so, as might be required to establish a monopoly. "Injury" to the American industry is a sufficient basis for a private action under the 1916 Act, and the record is replete with evidence that the American television receiver industry was in fact injured.

A second difference is that the antitrust laws relate to interstate and foreign commerce of the United States and activity in foreign nations is relevant only where it impinges upon such commerce. Dumping, on the other hand, originates

in a foreign market and by definition relates to costs and pricing in that market. The standard for dumping established by the dumping laws is a foreign market value with sales at lower prices into the United States market. The violation can be individual, or it can be as a result of a conspiracy of the foreign manufacturers. Neither intent to monopolize nor predatory pricing need be established. Although evidence of predatory pricing in the antitrust sense would certainly be a basis for finding intent to injure, as the Court of Appeals decided, the absence of predation as defined in antitrust cases does not mean that there is not an intent to sell below foreign market value and to injure an American industry. Thus, this Court's finding concerning predatory pricing in the antitrust context should not even be relevant, let alone binding, in a 1916 Act case.

A further difference is that in the *Matsushita* decision, this Court found that petitioners were not injured by a violation of the antitrust laws. In contrast, in the dumping case, the record shows a violation of the dumping laws, plus the requisite injury to both the American industry and to the petitioners. The only remaining element needed for petitioners to establish their case is that of "intent." The requisite intent under the Antidumping Act of 1916 is not an intent to conspire or an intent to monopolize nor is it necessarily the standard of intent relevant in antitrust cases.[2] It is an intent to injure an American industry which is relevant under the 1916 Act. Intent is not usually proved by direct evidence but by inferences from other evidence. The courts have great experience with the antitrust laws, and perhaps this Court could draw the conclusions set forth in the opinion of the majority as to the motivations and the business considerations of competitors with respect to pricing conspiracies. Drawing inferences as to the intent, objectives and motivations with respect to dumping considerations is a different matter, particularly those of foreign manufacturers from a different culture. In the absence of a significant amount of litigation on the issue of intent to injure under the 1916 Antidumping Act, conclusions of the courts in antitrust cases concerning the much debated issues of presumptions of con-

[2] This Court did not address itself directly to an "intent" issue in its *Matsushita* decision.

spiracy arising from parallel action in pricing should not be superimposed upon the antidumping statutes.

For Sherman Act cases, the requisite proof (or presumptions) must be of a conspiracy to monopolize or to fix prices, presumably common prices or a minimum or maximum. In the dumping context, the prices need not be agreed upon at all—a violation under this statute can result from an agreement or conspiracy, parallel action independently arrived at, or even wholly independent action. Even in the conspiracy context, a violation of the 1916 Act could result from a joint enterprise to invade the American market by below-cost sales without any agreement on prices whatsoever. Also, the requisite intent to injure need not be included in the joint action, but presumably could be the independent intent of some or all of the parties acting in their individual interests.

The record in the *Matsushita* litigation unquestionably includes enough evidence to go to trial with respect to the two issues of dumping and injury to the American industry. With respect to intent, it seems obvious that the extent of the dumping found by the United States Government, as shown in the record, is itself evidence that the foreign manufacturers must have known that substantial injury to the U.S. consumer electronics industry would necessarily result. Thus, under the usual rules governing proof of intent in civil suits, it may be inferred that the foreign manufacturers "intended the necessary and direct consequences of their acts," *United States v. Patten,* 226 U.S. 525, 543; 33 S. Ct. 141, 145; 57 L. Ed. 333, 342 (1913). Indeed, "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *United States v. United States Gypsum Co., et al.,* 438 U.S. 422, 444; 98 S. Ct. 2864, 2877; 57 L. Ed. 2d 854, 874 (1978). In an action based upon a statute, the standard of intent may range from purpose and knowledge to recklessness or negligence, and may be established by the specific statute and be peculiar to it. E.g., *Turner v. United States,* 396 U.S. 398 90 S. Ct. 642, 24 L. Ed. 2d 610

(1970).[3] The record before the Court of Appeals contains extensive evidence of the foreign manufacturers' purpose to evade United States antidumping laws and evidence of the continuation of dumping after a Treasury Department finding of dumping and tariff commission finding of injury to a domestic industry. Thus, there is more than enough evidence as to the requisite intent, a trial is warranted, and summary judgment was inappropriate.

CONCLUSION

SIA urges the court to grant the petition for a writ of certiorari to review the issues, or otherwise to issue its mandate to the Court of Appeals to reinstate its prior decision under the Antidumping Act of 1916.

---

[3] The standard applicable to the 1916 Antidumping Act has not yet been reviewed by this Court or the Court of Appeals. Constitutional requirements for criminal prosecution precluding a conclusive presumption which shifts the burden of proof to the accused have no relevance in this case.

Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1453 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,

Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Respondents.

BRIEF FOR COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AS AMICUS CURIAE IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL D. CULLEN
Counsel of Record
LAURENCE J. LASOFF
R. HARTMAN ROEMER
COLLIER, SHANNON, RILL, & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 342-8400

Counsel for:
Committee to Preserve American Color Television (a.k.a COMPACT)

Dated: April 10, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

11pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
BRIEF IN SUPPORT	1
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	3
A. The Antidumping Act of 1916 Provides a Unique Remedy For a Distinct Anticompetitive Practice	3
B. The Third Circuit's Error Has Adverse Implications For U.S. Workers In The Consumer Electronics Industry And Elsewhere	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. ___, 106 S.Ct. 1348 (1986) ...	3
In re Sanford Fork & Tool Co., 160 U.S. 247 (1895)	3
Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1978)	3
Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 807 F.2d 44 (3d Cir. 1986) ...	1
STATUTES:	
15 U.S.C. § 72 (Supp. III 1985)	3
19 U.S.C. § 1673 (1986)	4
MISCELLANEOUS:	
General Agreement on Tariffs and Trade, Article VI, 62 Stat. 3682	4
Color Television Receivers and Subassemblies Thereof, Inv. No. TA-203-6, USITC Pub. 1068 (1980) at A-27	6
Color Television Receivers from the Republic of Korea and Taiwan, Inv. Nos. 731-TA-134 and 135 (final), USITC Pub. 1514 (1984) at A-21	6

BRIEF IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

The Committee to Preserve American Color Television (a.k.a. COMPACT) respectfully requests as *amicus curiae* that the United States Supreme Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 807 F.2d 44 (3rd Cir. 1986) or in the alternative, that the Court issue a writ of mandamus to the Court of Appeals because the Court of Appeals misconstrued this Court's mandate. This brief is filed, with the consent of all parties, in support of the Petition For Certiorari of Zenith Radio Corporation and National Union Electric Corporation.[1]

INTEREST OF AMICUS CURIAE

The Committee to Preserve American Color Television (a.k.a. COMPACT) is a coalition of labor organizations and firms in the television industry.[2] COMPACT, an unincorporated association formed in 1976, has participated in numerous proceedings before U.S. Government agencies and the U.S. courts for

---

[1] Letters indicating consent have been filed with the Clerk.

[2] The members of COMPACT include: Allied Industrial Workers of America, International Union; American Flint Glass Workers Union of North America; Communications Workers of America; Corning Glass Works; Glass Pottery, Plastics and Allied Workers, International Union; Independent Radionic Workers of America; Industrial Union Department, AFL-CIO; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO; Owens-Illinois, Inc.; United Furniture Workers of America; and United Steelworkers of America.

the purpose of eliminating unfair and injurious competition by foreign producers in the sale of television sets in the United States market. COMPACT's activities were motivated in large part by a need to maintain the employment base of an industry that has been victimized by the pervasive dumping practices of its foreign competition.

The labor union members of COMPACT represent the overwhelming majority of workers who are, or were, employed by all of the current United States television manufacturers as well as by many of the companies which manufacture components incorporated into television sets. For example, the Independent Radionic Workers of America, the International Association of Machinists and Aerospace Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, and the International Brotherhood of Electrical Workers represent Zenith workers at four plants located in Chicago and Melrose Park, Illinois, Evansville, Indiana, and Springfield, Missouri. Many of these Union members are minority workers who reside in urban areas where unemployment is high and alternative job opportunities are scarce. Although these four unions have a direct and substantial interest in this action, the interest of COMPACT's other members is equally significant. The proper enforcement of the Antidumping Act of 1916 will affect not only Zenith and its workers but the entire domestic consumer electronics industry as well. As will be developed in this brief, the future of this once healthy industry is dependent on the decision in this case, since the law it addresses is the only trade statute that can provide

compensatory redress to those firms and workers injured by the unfair practice of dumping.

REASONS FOR GRANTING THE WRIT

The Third Circuit's dismissal of the antidumping claims was not warranted by this Court's decision, which explicitly declined to review the Court of Appeals' decision regarding those claims, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ___, 106 S.Ct. 1348, 1352, n.3 (1986). Despite the Third Circuit's confusion regarding the scope of this Court's remand, only the antitrust judgment was reversed. By exceeding this Court's mandate, the Court of Appeals has committed an error that must be corrected either upon an application for a writ of mandamus, or upon a new appeal. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 257 (1895); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978).

A. The Antidumping Act of 1916 Provides a Unique Remedy for a Distinct Anticompetitive Practice

The inappropriateness of the Third Circuit's application of this Court's opinion to the antidumping claims raised by Zenith under the Antidumping Act of 1916[3] is underscored by the significant differences between the Sherman Act and the antidumping laws, and in particular, the distinct problems these statutes were intended to address. The practice of dumping—which, unlike violations of the Sherman Act, does not necessarily involve conspiracy, below marginal cost pricing or injury to competition—has been universally and formally condemned by the international com-

---

[3] 39 Stat. 798, 15 U.S.C. § 72 (Supp. III 1985).

munity of nations because of resulting distortions to international trade, and the injury it is likely to cause to domestic firms and their workers.[4] The practice, which typically occurs in conjunction with a protected home market that is closed to outside competition, enables a foreign manufacturer to achieve economies of scale through excess production purposely created to lower overall per unit costs. The foreign manufacturer is then able to recover in its home market sales substantially all of its fixed costs and, at the same time, achieve substantial profits through sales at incremental prices in export markets.

Congress attempted to deal with the problem of dumping under two separate statutes. In the Antidumping Act of 1921,[5] Congress established a remedy pursuant to which the U.S. Customs Service imposes an additional duty on dumped imports in an amount equal to the approximate difference between high home market prices and low export prices. Since all duties collected under the 1921 Act are deposited in the U.S. Treasury, the purpose of this statute is clearly remedial rather than compensatory. In the Antidumping Act of 1916, Congress created a compensatory remedy pursuant to which firms injured on account of dumped imports could recover damages to compensate for their injuries.

The enforcement mechanism created by Congress in the 1916 Act responds to a different problem and

---

[4] General Agreement on Tariffs and Trade, Article VI, 62 Stat. 3682.

[5] 42 Stat. 11, 19 U.S.C. § 160 *et seq.* (1976). Now codified under Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 (1986).

provides qualitatively different remedies than those established under the antitrust laws. The decision of the Third Circuit in this proceeding ignores the fundamental differences between the problems addressed by the Antidumping Act of 1916 and the Sherman Act by holding that a failure to present sufficient evidence under the Sherman Act justifies dismissal of the antidumping charges as well. 807 F.2d at 49. The Third Circuit's decision is therefore erroneous and, if allowed to stand, will destroy the carefully designed and comprehensive statutory scheme which Congress created to deal with this problem.

B. The Third Circuit's Error Has Adverse Implications for U.S. Workers in the Consumer Electronics Industry and Elsewhere

American workers are particularly aggrieved by the decision of the Third Circuit to the extent it eliminates the only effective remedy to the pervasive dumping that has been evidenced in this litigation. The American worker does not benefit from the availability of cheap imported television sets or cheap products of any kind that are sold in the United States at less than their fair value. Before the average American can become a consumer, he or she must first become a worker and earn the money to consume. Dumped imports of television receivers have cost American workers thousands of jobs over the last twenty years, notwithstanding the existence of a dumping finding on televisions from Japan under the 1921 Act that has been in effect since 1971. The effect of that administrative finding is limited by the fact that it was issued under a statute that was designed for remedial purposes only. The 1921 Act was not intended to compensate the domestic industry for

the injury suffered as a result of over fifteen years of pervasive dumping practices. Only the Antidumping Act of 1916 is available for that purpose.

The appropriateness and need for such compensation is obvious. The United States International Trade Commission has conducted 19 injury investigations concerning television receivers or components since 1970. Fourteen resulted in affirmative determinations of injury by reason of imports, most of which were dumped. In these proceedings, U.S. workers have consistently warned of the adverse implications of dumping. But the long-term decline in employment tells the story best. The number of production and related workers engaged in the assembly of color televisions declined from a peak of 41,434 in 1973 to 22,470 in 1979, a decline of 46 percent.[6] By 1983, the number dropped still further to 18,023.[7] When workers employed in supply industries are added (cabinets, picture tubes, components, etc.), the total jobs lost to imports is undoubtedly much higher.[8]

The effect of the Third Circuit's ruling must also be considered in connection with the message it carries to the foreign competition. It can be argued on the basis of the appellate court's analysis of this

---

[6] *Color Television Receivers and Subassemblies Thereof,* Inv. No. TA-203-6, USITC Pub. 1068 (1980) at A-27.

[7] *Color Television Receivers from the Republic of Korea and Taiwan,* Inv. Nos. 731-TA-134 and 135 (final), USITC Pub. 1514 (1984) at A-21.

[8] There are no officially published data on employment trends in the supply segment of the color television industry but COMPACT estimates that there are at least two jobs in the supply segment of the television industry for every job associated with the final assembly of color televisions.

Court's "law of the case" that a foreign manufacturer can now dump with impunity into the American market without fear of liability for the compensatory damages to the industry injured by the practice of dumping. Indeed, to the foreign manufacturer, the ruling arguably carries the message that the injury inflicted by this predatory international trade practice can only be redressed under the same legal and evidentiary standards as a Sherman Act proceeding. This flies in face of the express congressional intent underlying the Antidumping Act of 1916.

The implications for U.S. workers in the television industry is obvious. For almost twenty years, U.S. workers have waged war on an unfair practice that has largely been responsible for the loss of more than 50 percent of its work force. Unfortunately, none of the preventative remedies pursued by U.S. workers in this industry were designed to compensate the industry for the losses it has suffered so that it is better able to provide jobs for the workers who depend upon it. The Antidumping Act of 1916 is unique to the extent that it is designed to provide for that compensation.

CONCLUSION

The Third Circuit's decision effectively deprives the U.S. television industry of the only chance of compensation for the injury suffered by reason of the universally condemned practice of dumping. We submit that the importance of this ruling and the consequences which it portends for U.S. industry and labor urgently requires this Court's attention and corrective action.

Respectfully submitted,

PAUL D. CULLEN
Counsel of Record
LAURENCE J. LASOFF
R. HARTMAN ROEMER
COLLIER, SHANNON, RILL & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 342-8400

Counsel for:
Committee to Preserve American
Color Television (a.k.a. COMPACT)

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

(5)

NO. 86-1453

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Respondents.

On Petition for Writ of Certiorari or Mandamus to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

Edwin P. Rome
Counsel of Record
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY
& MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500
Counsel for Petitioners
Zenith Radio Corporation
and National Union
Electric Corporation

Of Counsel
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

13pp

TABLE OF CONTENTS

Page

Table of Authorities ii

1. The Court Below Misconstrued This Court's Mandate 2

2. The Court of Appeals on Remand Did Not "[search] the enormous record in this case for any evidence of specific predatory intent." 3

3. The Intent Element of the Antidumping Act of 1916 Is Not an Insurmountable Obstacle to Relief 4

4. The Issues Are of Overriding Importance 8

Conclusion 10

TABLE OF AUTHORITIES

Cases:	Page
Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921)	10
Liparota v. United States, 471 U.S. 419 (1985)	5
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. __, 106 S.Ct. 1348 (1986)	2, 10
Pettibone v. United States, 148 U.S. 197 (1983)	5, 9
United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986)	5
United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986)	5
United States v. Welch, 810 F.2d 485 (1st Cir. 1987)	5
United States v. Wilson, 796 F.2d 55 (4th Cir. 1986)	5
Statutes:	
28 U.S.C. §2106	2
Antidumping Act of 1916, 15 U.S.C. §72	2, 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86-1453

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Respondents.

REPLY BRIEF FOR PETITIONERS

Nothing in respondents' brief detracts from the overriding importance of the issues in "this closely followed precendent-setting litigation,"[1] the antitrust aspects of which this Court previously agreed to hear even in an interlocutory posture. The Court of Appeals' determination on remand below finally dismisses *all* the antitrust and antidumping claims of the two American petitioners, Zenith Radio Corporation and National Union Electric Corporation.[2] The issues involved now assume even greater importance.

---

1. Respondents' own characterization in their June 7, 1984 petition for writ of certiorari in this case at No. 83-2004.

2. Nonetheless, the Court of Appeals' decision on remand does not end the litigation, because respondents' multi-million-dollar antitrust counterclaims against Zenith are still pending in the district court.

1. The Court Below Misconstrued This Court's Mandate.

Respondents attempt to portray the Court of Appeals' *sua sponte* determination to reopen its separate *antidumping* judgment on remand from this Court's antitrust decision in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corporation*, 475 U.S. ____, 106 S.Ct. 1348 (1986), as a development independent of any requirement the Court below perceived in this Court's narrow 5-4 decision in the antitrust segment. Brief in Opposition at 6-9. The Court of Appeals' Opinion on remand makes the exact opposite clear. The Court of Appeals expressly stated that it believed it was "*directed* to reconsider not only the Sherman Act claims, *but the entire case*." (A-6).[3] The Court of Appeals explicitly set forth its belief that the language of this Court's Opinion "appears to suggest that [the Court of Appeals] *must reconsider the Antidumping Act claims on which the Supreme Court did not grant certiorari*, as well as the Sherman Act claims which it did review." [4]

Moreover, the Court of Appeals confessed its puzzlement concerning the nature and scope of the remand, pointing to the fact that this Court "had the very same summary judgment record before it that [the Court of Appeals] had considered" as well as the fact that this Court "exercise[s] the same plenary review of the propriety of the district court summary judgment." (A-6).

---

3. References to the Appendix to the Petition are cited herein as "A- ".

4. Respondents erroneously suggest that the Court of Appeals simply exercised "clear authority under 28 U.S.C. § 2106" in "reconsidering its 1916 Act decision." Brief in Opposition at 8. However, the Court of Appeals cited only this Court's mandate as authority for its action. It never invoked 28 U.S.C. § 2106 as the basis for its action. Moreover it is doubtful whether courts of appeals possess continuing, uncircumscribed powers under § 2106 to amend and modify judgments — such as the Court of Appeals' separate antidumping judgment — which have not been appealed.

The Court of Appeals stated that it was bound by "the law of the case" with respect to all of the issues it addressed on remand. After reciting the record economic evidence on which it had relied in previously reaching its contrary conclusions (A-7), the Court of Appeals explicitly stated that this Court's discussion of respondents' presumed economic motives constituted "holdings . . . [that] are the law of the case and are binding on this Court." (A-7). The Court of Appeals' repeated confessions of confusion aside, there can be no serious question that the Court of Appeals (i) believed itself bound by the "law of the case" doctrine with respect to the motive issue, and (ii) believed it was required to apply this "law of the case" not only in its further consideration of petitioners' Sherman Act claims, but also to dismiss petitioners' separate individual and conspiracy claims under the Antidumping Act of 1916, 15 U.S.C. § 72.

2. The Court of Appeals on Remand Did Not "[search] the enormous record in this case for any evidence of specific predatory intent." Brief in Opposition at 10.

In the aftermath of its comments regarding the "law of the case," the only consideration the Court of Appeals gave to the element of intent under the Antidumping Act of 1916 is limited to a cryptic *one-sentence* conclusion that this Court's antitrust Opinion required "*other evidence*" and its comment that there was "no other evidence tending to show that any of the defendants still in the case dumped consumer electronic products with the required intent to injure or to destroy a United States industry." (A-11).

The Court below thus put aside and ignored all the intent evidence it had considered relevant in its earlier opinions. No mention is made of the legal advice on antidumping matters that respondents received throughout the entire period from their sophisticated United States trade counsel, or of respondents' intimate familiarity with United States antidumping laws. No

mention is made of respondents' active participation in the antidumping proceedings relating to television receivers imported from Japan, proceedings that resulted in a Treasury Department finding of dumping and, in 1971, the United States Tariff Commission's unanimous finding that the United States industry had been injured by respondents' dumping. Nor is mention made of respondents' subsequent continuation of their dumping after the injury finding and the Japanese companies' clandestine import schemes for concealing this ongoing dumping from United States Customs officials in order to enable them to continue to dump, with the attendant continuing injury to the United States industry of which respondents were thereafter certainly on notice.

In short, the voluminous record evidence clearly supports the conclusion that respondents knew that dumping was illegal and, knowing this, engaged in such dumping, and deliberately did so with knowledge of its highly probable devastating effects on the United States industry, and that they acted with the conscious purpose of producing injury to the United States industry.[5] Court of Appeals on remand mistakenly believed it was precluded from giving weight to this evidence. Instead, giving effect to its understanding of the Sherman Act "law of the case," the Court below simply and perfunctorily reversed its conclusion on the Antidumping Act claims in the unreviewed antidumping segment of the litigation.

3. **The Intent Element of the Antidumping Act of 1916 Is Not an Insurmountable Obstacle to Relief.**

Respondents' contention that Congress deliberately crippled effective enforcement of the Act by introducing an intent element is not only self-refuting, but collides with settled doctrines regarding proof of intent. Brief in

5. In fact, respondents never disputed that petitioners' proof, as recited in their Final Pretrial Statement, was deficient with respect to actual damage. 723 F.2d at 311; Transcript of Oral Argument of November 12, 1985, at No. 83-2004, at 48.

Opposition at 10-11. The Act requires proof of dumping with only one of the five alternative mental states listed in the Act, *i.e.*, "with the intent [1] of destroying or [2] injuring an industry in the United States, or [3] of preventing the establishment of an industry in the United States, or [4] of restraining, or [5] monopolizing any part of trade and commerce in such articles in the United States." 15 U.S.C. § 72. Proof of an "intent of injuring" alone suffices.

As this Court has observed, "the required mental state may of course be different for different elements of a crime." *Liparota* v. *United States*, 471 U.S. 419, 423 n.5 (1985). Thus, the 1916 Act requires proof only of a mental state aimed at producing designated consequences flowing from dumping. The record evidence is sufficient to show it. It may even be inferred from the natural and probable consequences of respondents' acts. *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893); *United States* v. *Wilson*, 796 F.2d 55, 58 (4th Cir. 1986). Although proof of an "intent of injuring" may not involve proof of consciousness of wrongdoing, *mens rea* or "evil-meaning mind," proof of such an intent suffices under settled principles if it shows that defendants "knowingly did an act which the law forbids, purposely intending to violate the law." *United States* v. *Welch*, 810 F.2d 485, 488 (1st Cir. 1987); *United States* v. *Harrold*, 796 F.2d 1275, 1282 n.7; (10th Cir. 1986); *United States* v. *Hayes*, 794 F.2d 1348, 1351 (9th Cir. 1986).

The record is full of evidence of respondents' guilty knowledge, of their consciousness of guilt, and of a continuous course of conduct by each of them designed to conceal dumping — concealment aimed both at preventing detection of past dumping and at enabling them to continue to dump. Respondents deliberately set their United States prices at dumping levels below their own Japanese market prices and far below the prevailing prices of targeted United States television manufacturers. They set their so-called "check prices" — which they

falsely reported to United States Customs as their *actual* United States import prices — at levels below their Japanese market prices. They also acknowledged in the "Rationales" of their written "check price" agreements that if they priced their imports below "check price" levels their imports *would* injure United States manufacturers.

With advance knowledge of those injurious effects, and continuously receiving knowledge and information concerning the injury it had caused and was causing to the United States industry as their conduct proceeded, these companies systematically sold at United States import prices that were below the "check prices," and concealed their actual lower prices from United States Customs for the express purpose of evading the United States antidumping laws. 723 F.2d at 311. The record shows that the margins between their Japanese market prices and their United States import prices were as high as 60%. The enormous margins by which respondents *undersold* their United States competitors in the United States market were equally dramatic.

Respondents participated in the Treasury Department's dumping investigation, and thus were aware of the evidence of the decimation of the United States industry which was adduced in hearings and which led to the United States Tariff Commission's unanimous finding of injury to the United States industry. Nonetheless, thereafter the Japanese manufacturers continued to dump and to conceal their dumping. They lied about their prices on their customs entry documents at the time of importation. They again lied about their prices to the Treasury Department concerning their actual United States import prices in their questionnaire submissions in the dumping investigation.[6] They met with

6. Having lied in their questionnaire responses, defendants later attempted to block petitioners' access to those submissions in discovery in this litigation and then lied about their true prices again in their answers to petitioners' interrogatories.

importers and discussed steps to suppress testimony of knowledgeable witnesses on the issue of injury to the United States industry in the Tariff Commission's industry injury hearings.

Respondents' dumping was also carried out in such a way as not to interfere with each others' sales activities. Respondents admittedly registered, divided and allocated large United States importers among themselves, a step that ensured that the full brunt of the injurious and intended effects of their dumping was aimed at and brought down directly and exclusively on the American manufacturers competing against them for that business. 723 F.2d at 311. As the Court below found, this practice, combined with respondents dumping, "permit-[ted] concentration of the effects of dumping upon American competitors. . . ." 723 F.2d at 311.

Measured by any established standard of proof of a statutory mental element, such evidence is sufficient. Respondents were not only aware of a high probability of injury to the United States industry; such injury began to occur as soon as respondents began large-volume exports to the United States and continued for a substantial period of time as their dumping eliminated one after another of the United States manufacturers — including petitioner National Union Electric Corporation. Thus, respondents quickly came to possess *actual* knowledge of the injury their dumping caused to the United States industry and nonetheless continued to dump and to conceal their dumping with full knowledge of its illegality and of its effects on the United States industry.

Thus, but for the Court of Appeals' crucial misapplication of this Court's discussion of motive — in the unrelated context of its significance as circumstantial proof of conspiracy — and its belief that this Court's antitrust determination constituted novel and binding "law of the case" which required the Court below to vacate its

separate *antidumping* judgment, petitioners' record evidence clearly suffices to create a genuine issue of fact warranting a trial.

4. The Issues Are of Overriding Importance.

This litigation is no less important now that the Court of Appeals has completely foreclosed the possibility of legal relief to the American manufacturers than it was when, at respondents' behest, this Court previously agreed to review the Court of Appeals' prior wholly *interlocutory* reversal of summary judgments in respondents' favor. On the contrary, it is more important than ever.

The decision below is not only a final disposition of *all* of petitioners' claims; it totally emasculates the *only* Congressionally-created private remedy that American manufacturers have to protect their industries and their workers, and does so on a "law of the case" basis never contemplated in this Court's prior decision. The Court of Appeals' dismissive ten-page opinion on remand therefore has profound and adverse implications for the many American manufacturing industries that are forced daily to confront the trade onslaught dealt by vast foreign multinational enterprises with the pelf, proclivity, and unique economic incentive to employ dumping as a weapon to achieve their international trade objectives. The Court below, in its application of the Act, frustrates the purposes of a remedial statute.

Its decision is economically unsound. It fails to recognize and apply the distinctly different economic factors drawn into play by the two-market, two-price phenomenon of dumping.

Its decision is unfair. It permits and even encourages foreign manufacturers to dump their manufactured products into the United States from their high-price, closed home markets — a death sentence for the affected United States industries and their workers, who must attempt to survive in the long-run on sales at unrenumerative prices in this market without the luxury

of a non-competitive closed home market where high price levels permit their foreign rivals to recover all their fixed costs in large-scale production operations and to dump their expanding output here.

This litigation, before this Court now for a second time, is closely followed and precedent-setting. Its importance to crucial legal issues affecting this country's international trade policy is attested to by the fact that this litigation has been monitored from its inception by the Japanese Ministry of International Trade and Industry, which in its May 29, 1984 *Note Verbale* to the Department of State expressed its "keen interest in this case." Brief of the Government of Japan as Amicus Curiae in Support of the Petition for a Writ of Certiorari, Appendix at 1a, at No. 83-2004. The United States has even been told that this litigation "could very well create extensive feelings of frustration among the Japanese public." *Id.* at 3a. However, the interests of the many affected American industries and the feelings of frustration of the tens of thousands of unemployed American workers who formerly made their livelihood in these industries are no less important.

Finally, it must be remembered that the Antidumping Act of 1916 does not require higher prices in the United States. It requires only the elimination of substantial differentials between foreign home market prices and United States import prices. If foreign manufacturers are efficient enough to sell at the same low prices in both the Japanese market and the United States market, the Act does not impede them from reaping the full rewards of greater efficiency. But there is no demonstration of foreign manufacturers' superior efficiency in this record. Competition is a lawful and desirable end, but the basic law of conspiracy forbids not only agreement to do an unlawful thing, but also agreement "to accomplish some purpose not in itself criminal or unlawful *by criminal or unlawful means.*" *Pettibone* v.

United States, 148 U.S. 197, 203 (1893); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465-66 (1921). The Act reaches such a conspiracy. It also reaches individual conduct.

As the recent trade sanctions imposed on Japan's dumped semiconductor products continue to illustrate, dumping and the devastating injury to American industries which it causes do not disappear with the transitory flutter of diplomatic obeisance. The continued effectiveness of the Congressionally-provided private remedy under the Antidumping Act of 1916 is and will remain crucial. The Court of Appeals' decision on remand, based on its misperception of "law of the case" established by this Court's decision in *Matsushita*, is a serious misstep on questions of national importance in the trade area.

CONCLUSION

Petitioners respectfully pray that the Court issue a writ of certiorari or of mandamus to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

EDWIN P. ROME
Counsel of Record
WILLIAM H. ROBERTS
ARNOLD I. KALMAN
BLANK, ROME, COMISKY
& MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Counsel for Petitioners
Zenith Radio Corporation
and National Union
Electric Corporation

OF COUNSEL:

PHILIP J. CURTIS
JOHN BORST, JR.
Zenith Radio Corp.
1000 Milwaukee Ave.
Glenview, IL 60025